134-47

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM 1889.**

No. 179.

HAMILTON ORMSBY, EDMONIA ORMSBY, THOMAS W. TAYLOR, PHILIP B. MATHEWS, ELOISE T. TAYLOR, FANNY I. MATHEWS, AND SARAH C. COLMESNIL, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM B. WEBB AND CHARLES D. DRAKE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

**FILED OCTOBER 15, 1886.**

# SUPREME COURT OF THE UNITED STATES.

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*a* *Transcript of Record.*

Supreme Court of the United States.

HAMILTON ORMSBY, EDMONIA ORMSBY, THOMAS W. TAYLOR, Philip B. Mathews, Eloise T. Taylor, Fanny I. Mathews, and Sarah C. Colmesnil, Plaintiffs in Error,
*vs.*
WILLIAM B. WEBB and CHARLES D. DRAKE, Defendants.

In error to the supreme court of the District of Columbia.

*b* UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said court, before you, between Hamilton Ormsby, Edmonia Ormsby, Thomas W. Taylor, Philip B. Mathews, Eloise T. Taylor, Fanny I. Mathews, and Sarah C. Colmesnil, plaintiffs, and William B. Webb and Charles D. Drake, defendants, being No. 26031 at law, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 8th day of March, in the year of our Lord 1886, and of the Independence of the United States the one hundred and tenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To William B. Webb and Charles D. Drake:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Hamilton Ormsby, Edmonia Ormsby, Thomas W. Taylor, Philip B. Mathews, Eloise T. Taylor, Fanny I. Mathews, and Sarah

C. Colmesnil, are plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Just.*

Rec'd a copy of the foregoing citation this 10 day of M'ch, 1886.
ENOCH TOTTEN,
*For Defendants.*

1 *Caveat. Filed in Orphan's Court Feb'y* 9, 1885.

In the Supreme Court of the District of Columbia.

To the honorable the judges of the supreme court of the District of Columbia, holding a special term of said court for probate business:

Your petitioner, Sarah C. Colmesnil, of Louisville, in the State of Kentucky, respectfully shows unto your honors that there has been presented to said court and is now on file therein a certain paper-writing which William B. Webb and Charles D. Drake has [have] presented and pretends that the same is the last will and testament of Levin M. Powell, late of the said District, now deceased.

Your petitioner further shows and gives your honor- to know that she is the daughter of the late Maj. Edmund H. Taylor, whose wife was Eloise Thruston, and the sister of Levin M. Powell's mother; that the said Levin M. Powell, deceased, left no widow or children or descendants—no brothers or sisters nor father or mother surviving him, and no descendants of any brother or sister; that he left your petitioner and ten others as first cousins and his only heirs-at-law.

Your petitioner is informed and verily believes, and so charges to this honorable court, that the paper-writing aforesaid is not the last will and testament of the said Levin M. Powell, deceased,
2 and that he never executed and published it as such, as required by law.

Your petitioner further represents that the said paper-writing, so alleged to be the last will and testament of the said Levin M. Powell, deceased, purports to bear date on the 27th day of October, A. D. 1884; and said petitioner is informed and believes that the said Levin M. Powell died in the said District of Columbia on or about the 15th day of January, A. D. 1885; that on the day and at the time it is claimed that he executed said paper-writing he was not of sound mind and disposing memory; that he had been very ill for some time; that he was in his eighty-second year and very feeble; that about three years ago he had a cataract removed from his eye; but at the time of his death and for some time before he had become bedridden and blind and only recognized persons by their voice and names; that by reason of his old age and infirmities his mind, at the time of the alleged execution of the said paper-writing, had become so weakened and demented that he had no memory and

was wholly unable and incompetent to have, express, or execute the said paper-writing or any will whatever.

Your petitioner further represents that she is informed and believes that the said Levin M. Powell was possessed, at the time of his death, — a very large estate, not less — $100,000, and
3 that the said William B. Webb and Charles D. Drake are named as executors; that among the legatees named in said paper-writing is one Harriet C. Stewart, for a very large legacy, besides sharing in the residuary clause of said paper-writing; that petitioner is informed and believes that said Harriet C. Stewart came to the house of the said Levin M. Powell the night before the death of the wife of the said Levin M. Powell and has remained there ever since and was there during the last illness of said Powell, having charge of and superintending all the affairs of the house, as well as managing the private business of said Powell; that petitioner charges that if the said Powell's hand was placed to said paper-writing it was not done by his will, but by the will, procurement, undue influence, and fraud of the said Harriet C. Stewart, and that the execution of said paper-writing was not the will or the act of the said Levin M. Powell, but the will and act of the said Harriet C. Stewart and others in collusion with her.

Your petitioner therefore prays that all further proceedings looking to the probate of said paper-writing may be suspended until it can be determined, as provided by law, whether the said paper-writing is the last will and testament of the said Levin
4 M. Powell, deceased; that appropriate issues may be directed by the court to be tried as provided by law; that in the meantime some proper persons may be appointed as collectors of said estate.

SARAH COURTNEY COLMESNIL.

THE STATE OF TEXAS, } ss:
*County of Harris,* }

I solemnly swear that I have read the above petition by me signed, and the facts therein stated upon information and belief I believe to be true, and the facts therein stated of my own knowledge I know to be true.

SARAH COURTNEY COLMESNIL.

Sworn and subscribed to before me this 5th day of February, A. D. 1885.

[SEAL.] GARNETT HARDCASTLE,
*Notary Public, Harris County, Texas.*

Filed February 9, 1885.

On the 13th February, 1885, Hamilton Ormsby and Edmonia E. Ormsby filed caveats; on the 16th of February, 1885, Thomas W. Taylor, Eloise T. Taylor, Philip P. Matthews, and Fanny I. Matthews also filed caveats.

5 *Issues from Probate. Filed Feb'y 9, 1885.*

Upon consideration of the petition of Charles D. Drake and William B. Webb propounding, as the last will and testament of the said Levin M. Powell, a certain paper-writing bearing date on the 27th of October, 1884, and the petition and caveat of Sarah Courtney Colmesnil denying the said paper-writing is the last will and testament of the said Levin M. Powell, it is, this 13th day of
6 February, 1885, ordered, adjudged, and decreed that the following issues be transmitted to be tried in the circuit court before a jury, viz:

First. Whether the said paper-writing purporting to be the last will and testament of the said Levin M. Powell, bearing date on the 27th of October, 1884, was executed and attested in due form of law.

Second. Whether the contents of said paper-writing were read to or by the said Levin M. Powell at or before the alleged execution thereof by him.

Third. Whether the said Levin M. Powell at the time of the alleged signing of said paper-writing was of sound and disposing mind and capable of executing a valid deed or contract.

Fourth. Whether the said writing was executed by the said Levin M. Powell under the influence of suggestions, importunities, and undue persuasion of the said Harriet C. Steward or any other person or persons when his mind, from its disordered, diseased, and enfeebled state, was unable to resist the same.

Fifth. Whether the execution of said paper-writing was procured by fraud, misrepresentation, or undue influence or persuasion of the said Harriet C. Steward or any other person or persons acting of their own volition or under the direction of the said Steward.

A. B. HAGNER,
*Associate Justice.*

7 *Will of L. M. Powell.*

In the name of God, Amen. I, Levin M. Powell, of Washington city, in the District of Columbia, being of sound and disposing mind, memory, and understanding, knowing the certainty of death and the uncertainty of the time thereof, and being desirous so to arrange my worldly affairs that I may be the better prepared to leave this world when it shall please God to call me hence, do make, publish, and declare this, and this only, as and for my last will and testament:

Item. First and principally, I commit my soul to Almighty God and my body to the earth, to be buried in such manner as to my executors, to be hereafter named, shall seem, my condition in life duly considered, most fit and proper; and after all my funeral expenses and just debts, if I have any, are paid, I dispose of my estate in manner and form as follows, to wit:

Item. Second, I direct that my entire estate—real, personal, and mixed, of whatever consisting and wheresoever situated, except in

so far as I shall otherwise herein specifically devise or provide—shall be taken by my executors hereinafter named, or the survivor of them, and shall be by them sold at as early a day as practicable, upon such terms and conditions as to them shall seem best and most advantageous for all persons concerned, and so that the best price can be obtained therefor, and that the proceeds arising from such sale shall be by my said executors distributed and paid over to the persons hereinafter named in the sums and upon the terms and conditions hereinafter set forth and contained—that is to say, to Jeannette T., daughter
8 of Mrs. M. J. Manning, of Baltimore, Maryland, known as Nettie, the sum of two thousand dollars; to Julian H. Thruston, son of Mrs. Bessie Thruston, widow of George A. Thruston, late of Cumberland, Maryland, deceased, the sum of five thousand dollars, to be by him taken and held in trust for his mother and her children, said sum to be invested and the income derived therefrom paid to his mother during her life, and in further trust upon her death to divide the said sum equally among her children who shall survive her, share and share alike; and I do further give and bequeath to the said Julian H. Thruston the sum of five hundred dollars as a compensation to him for his services in and about the foregoing trust; and it is my desire that no bond shall be required of him for the faithful performance of the said trust, unless his mother, Mrs. Bessie Thruston, shall require such to be given; to Mrs. Charles B. Thruston I give and bequeath the sum of three thousand dollars, to be taken and held by her in trust for her unmarried daughters and her son Charles, the income to be used by her, the said Mrs. Charles B. Thruston, for her own purposes during her natural life, and upon her death the said sum of three thousand dollars is to be divided among her children living at that time, share and share alike, and it is my desire that no bond be required for the faithful performance of this trust; to Alfred B. Thruston I give and devise the sum of four thousand dollars, to be taken by him and held in trust for Mrs. Jeannette T. Rader and her children, the said sum to be invested and the income derived therefrom paid to Mrs. Rader during her natural life, and upon her death the said sum to be divided among her children equally, share and share alike; to Gates P. Thruston and his sister, Mrs. Houck, the sum of six thousand dollars, to be equally divided between them; to Alfred Buckner Thruston, son of Alfred Thruston, deceased, his heirs, executors, and administrators, three thousand dollars; to Charles S. Powell, of Alexandria, Virginia, son of Cuthbert Powell, deceased, two thousand five hundred dollars; to Dr. Robert C. Powell, of Alexandria, one thousand dollars; to Cuthbert L. Powell, of Danville, Virginia, brother of Dr. Robert C. Powell, one thousand dollars; to Charles Simms Powell, in trust for Rev. Cuthbert S. Powell and Levin Powell, the sum of fifteen hundred dollars, the said
9 sum to be invested and the income derived therefrom to be divided equally between them during their joint lives, and the said sum, upon the death of either, to be paid to the survivor; to Virginia Taylor, widow of Lawrence B. Taylor, of Alexandria,

Virginia, one thousand dollars; to Harriet Chilton Stewart, widow of Charles Stewart, deceased, ten thousand dollars; to Daniel B. Conrad, late of the United States Navy, one thousand dollars; to William B. Webb, three thousand dollars, to be by him taken and held in trust for Mrs. Brand, my first cousin, and daughter of my aunt, Eloise Tayler, deceased, of Louisville, Kentucky, for and during her natural life, the income thereof to be paid to her during that time, and upon her death, in further trust, to pay the said sum of three thousand dollars to the trustees of the Garfield Memorial Hospital, recently organized, or other persons having the control of the affairs of that institution; to my good friends William G. Moore and William S. Mitchell, both of Washington city, as a testimonial of my regard for them and by way of acknowledgment of their many kindnesses to me, five hundred dollars each; to Mrs. Lucy L. Powell, one thousand dollars; to Bedford Calwell, son of James Calwell, deceased, of the White Sulphur Springs, Greenbrier county, Virginia, five hundred dollars; to Dr. Alfred H. Powell, of Baltimore, Maryland, one thousand dollars; to Catharine, called Kate, daughter of Dr. Llewellyn Powell, deceased, late of Louisville, Kentucky, one thousand dollars; to Maria Powell, of Fauquier county, Virginia, daughter of John Levin Powell, deceased, one thousand dollars, and to Archibald Atkinson, of Baltimore, Maryland, I give one thousand dollars. It is my will and desire that if any of the parties to whom I give legacies in this my will prefer to take bonds instead of money in the payment of such legacies, he or she may be permitted so to do by taking any such bond or bonds at the then market value thereof in cash; and it is my further desire and will that any of the said legatees who shall in any way obstruct or hinder the execution of this will shall forfeit the payment of any legacy herein provided to him or her, and I hereby direct my said executors to refuse to pay any such legacy.

Item. Third, I give, devise, and bequeath to Gates P. Thruston the picture of Washington, by Peale, and the two oil paintings hanging in the niches of the east side of the front parlor of my residence; to Robert C. Powell, of Alexandria, Virginia, the portraits of the Powell family, except the one of myself, of which I die possessed; the picture by Church, in the dining-room of my residence, I give to my friend, William B. Webb; the picture of Piney Point, in the same room, to Mrs. Jeannette Thruston Rader; the picture of the Mouth of the Po to my friend, Joseph H. Bradley; all the other pictures in my residence, except those particularly devised, I give to Mrs. Jeannette Thruston Rader; all the pictures of the Bradley family belonging to me I give and devise to Mrs. Walter D. Davidge to take and hold for Maria Bradley, daughter of Doctor William A. Bradley, until she shall be satisfied to deliver them into her keeping; the engraving of the picture of Bierstadt, which hangs in the reception-room of my residence, I give to my friend, Charles D. Drake, and I also give and bequeath to him all of my correspondence and official records, to be by him taken and disposed of as he shall think fit; to Mrs. Drake, the wife of Charles D. Drake, I give one of the Persian table covers in my back parlor,

and the other to Mrs. Jeannette T. Rader; to George Perego, my servant, if he is in my service at the time of my death, I give three hundred dollars, and if he shall have left my service before that time, one hundred dollars.

Item. Fourth, I direct that the rest and residue of my estate remaining after the payment of my debts, funeral expenses, and the foregoing legacies shall be divided into equal shares, and I give, devise, and bequeath the same as follows: To Dr. Alfred H. Powell, one of said shares; to Mrs. Harriet C. Stewart, one of said shares; to Mrs. Jeannette T. Rader, one of said shares; to Mrs. Alfred B. Thruston, one of said shares absolutely, and to Alfred B. Thruston, one of said shares in trust for the use and benefit of his sister, Mrs. Sidney Branna; to Maria Powell, daughter of John Levin Powell, one share; to Laura, wife of John Randolph Tucker, of Lexington, Virginia, whose name before marriage was Powell, one share; to Mary, widow of the late Surgeon General Joseph K. Barnes, of the United States Army, one share, and to the Rev. John Dalrymple Powell, rector of a church in Portsmouth, Virginia, one share.

Item. Fifth, it being my wish and desire to make some
11 contribution to the navy of the United States, of which I have been for so many years, I hope, a worthy member, and so in a measure to pay the debt I feel I owe the honorable profession I have pursued through a long lifetime, and to that end to establish in the Columbian University, in the District of Columbia, in a manner most conducive for that purpose, a means for the education of such young men as may be willing to profit therefrom in the branches of education best fitted to prepare them for officers of the line in the navy of the United States, or for the places of mates or captains in the merchant-marine service of the United States, I do hereby give, devise, and bequeath to the said Columbian University and its successors all those certain pieces or parcels of ground situate and lying in said city of Washington and known and distinguished on the plats of said city as lot lettered C and the east five feet from front to rear of lot D of Samuel D. King's subdivision of lots numbered one (1), two (2), three (3), thirty-two and thirty-three (33), in square numbered one hundred and twenty-six (126), duly recorded in the surveyor's office of said city, beginning for the said parcels at a point on I street north, distant seventy-eight (78) feet west from the corner of I and 17th street, and running thence north parallel with 17th street one hundred and five (105) feet to a fifteen-foot alley; thence west with said alley thirty-five (35) feet; thence south one hundred and five (105) feet to the north line of said I street; thence east with said I street thirty-five (35) feet to the point of beginning, together with all and singular the improvements, rights, privileges, and appurtenances to the same belonging, in trust for the purposes following, and for no other purpose whatever—that is, in trust to create an endowment to be known as the Admiral Powell endowment—and with that view to take the said property and the same to rent from year to year or to lease for a term of years as to the trustees and overseers of said university shall

seem best, and the rents, issues, and profits arising therefrom, after first paying out of the same the taxes, insurance, repairs, and other expenses, to devote as far as the same will go, under such regulations as to the said trustees and overseers may seem best, to the free education of such young men as may desire to take advantage of the said endowment by way of their preparation for entrance into the Naval Academy
12 at Annapolis, Maryland, or such as may fit them to become mates or masters in the merchant-marine service of the United States, such preparation to be confined in the case of each young man so embracing the advantages of the said endowment to one year, and to include principally the studies following—that is to say, arithmetic, geometry, trigonometry, and astronomy, with the use of astronomical instruments, the construction of charts, and the application of this knowledge to hydrographical survey by latitude and longitude, and, if possible, such study as will give to such young men a knowledge of scientific voyages of discovery and other matters relating to war and commerce on the high seas, and it is further my desire that this endowment shall, if possible, embrace in its benefits such apprentices as, having filled their time in the great steam manufactory establishments of the country, may apply for appointment from civil life in the steam-engineer department of the United States Navy; to such I would like to have a year's education afforded under such regulations as the president and faculty of the university may think proper; and should it at any time for any reason be impossible to carry into effect the trusts, provisions, and conditions having relation to and herein imposed upon this bequest by me made for the creation of the endowment described on the part of the said Columbian University, or should it be made manifest at any time that the said trust is not being administered in accordance with my wishes and desires and in conformity with the conditions specified, then and in such case it is my will and desire that the said endowment shall be placed in other hands, and to that end, and upon the happening of the contingency mentioned, I do hereby give, devise, and bequeath the said property to the Johns Hopkins University of Baltimore, in the State of Maryland, and its successors, to be taken and held by the said university or the officers thereof proper for that purpose, upon the trusts and for the purposes hereinbefore particularly set forth in the bequest of said property to the Columbian University, in such manner that the purposes of the said endowment as by me indicated may be fully carried into effect.

Item. Sixth and lastly, I do hereby nominate, constitute, and appoint Charles D. Drake and William B. Webb, of Wash-
13 ington city, in the District of Columbia, to be the executors of this my last will and testament, and it is my will and desire that they be not required to give the bonds usually exacted for the faithful performance of their duties as such executors, or, if this cannot be done, that in view of the fact that I owe no debts, that the penalty of such bond may be made only nominal; and in order to expedite, as far as possible, the immediate settlement of my estate,

I give, devise, and bequeath to each of my said executors the sum of two thousand five hundred dollars, to be by them taken in lieu of all and every commission or allowance for their services as executors of this will, hereby revoking and annulling all other wills by me made, and hereby declaring this and this only to be my last will and testament.

In testimony whereof I have hereunto set my hand and seal this twenty-seventh day of October, A. D. 1884.

[SEAL.] L. M. POWELL.

Signed, sealed, published, and declared by Levin M. Powell, the above-named testator, as and for his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have subscribed our names as witnesses thereto, the word "steam," thirteenth page, eighth line, being first interlined.

H. RANDALL WEBB.
THOS. F. COGAN.
HENRY R. ELLIOTT.

A true copy.
Teste:

H. J. RAMSDELL,
*Register of Wills, D. C.*

February 18th, 1885.

14 *Notice in Cir. Ct. of S. C. D. C. to Fix Parties. Filed March* 18, 1885.

In the Supreme Court of the District of Columbia.

In the Matter of the Last Will and Testament of LEVIN M. POWELL, Deceased. No. 26031.

GENTLEMEN: Take notice that we will, as propounders of the last will and testament of Levin M. Powell, deceased, on Thursday, the 12th day of March, 1885, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, call the attention of the court, in special term as a circuit court, to the issues framed in the court holding a special term for orphans' court in the above matter, and will ask the said circuit court to make an order determining who are to be the parties plaintiffs and defendant to the said issues, and directing the clerk of the court to enter the same upon the docket of said court in the name
15 of said parties accordingly; and take notice, further, that we shall at the same time also ask the court holding a special term as a circuit court to fix an early day for the trial of said issues in accordance with the provisions of the act of the Assembly of Maryland in such case made and provided.

—— ——.

DISTRICT OF COLUMBIA, *To wit:*

I, H. Randall Webb, do depose and say that I have this 9th day of March, 1885, served copies of the above notice upon William S.

Abert and J. J. Johnson, the attorneys and proctors for the parties contesting the will of the said Levin M. Powell.

H. RANDALL WEBB.

Sworn and subscribed to before me this 9th day of March, A. D. 1885.

[SEAL.] HENRY R. ELLIOTT,
*U. S. Comm'r for the Dist. of Col.*

16 *Order Settling Parties & Directing Trial. Filed Mar.* 18, 1885.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

*In re* the Last Will and Testament of LEVIN M. POWELL, Dec'd. No. 26031.

It appearing to the court that by an order passed at a special term thereof, held for orphans' court business, on the 13th of February, 1885, certain issues having relation to a certain paper propounded in that court as the last will and testament of Levin M. Powell, deceased, were directed to be transmitted to this court to be tried before a jury, it is this 13th day of March, 1885, ordered that Sarah Courtney Colmesneil, Thomas W. Taylor, Eloise Thruston Taylor, Philip P. Matthews, Fanny T. Matthews, Hamilton Ormsby, and Edmonia Ormsby, caveators, shall be plaintiffs and Charles D. Drake and William B. Webb, the proponents of the last will and testament of Levin M. Powell, deceased, shall be defendants in the pro-
17 ceedings in the trial of the said issues, and that the clerk of the court will make entry of said proceedings upon the docket of the court in due form in the said parties; and it is further ordered that the said issues shall stand ready for trial upon their being entered upon said docket as aforesaid in every respect as if they had been regularly placed upon the trial calendar of this court, and that the same shall stand and be set down for trial on the 15th day of April, 1885.

W. S. COX, *J.*

18 *Bill of Exceptions. Filed May 9th*, 1885.

I.

Be it remembered that at the trial of this cause the caveators, to maintain the issues on their part joined, offered the testimony of James G. Colmesnil, tending to prove that the decedent and alleged testator had told the witness that he received the bulk of his estate by breaking the will of his grandfather, Charles M. Thruston, who was also the ancestor of the caveators, and that his estate consisted in a great degree of that property with its accumulations; to which offer the caveatees, by their counsel, objected, and the court sustained the objection and refused to admit the evidence; to which judg-
19 ment in this behalf the caveators, by their counsel, then and there excepted, and the presiding justice noted said exception

upon his minutes, and it is prayed that the same may be saved, which is accordingly done this 9th day of May, 1885, now for then.

[SEAL.] W. S. COX, *J.*

*Bill of Exceptions.*

II.

Be it further remembered that at the trial of this cause the caveators, to maintain the issues on their part joined, offered in evidence the testimony of Alice S. Condon, the nurse of Admiral Powell during his last sickness, tending to show that during the time that witness was in the Admiral's house as such nurse and prior to the death of the Admiral, and after the time of the alleged execution of said will, Mrs. Harriet C. Stewart, a specific and residuary legatee named in the said alleged will, had told the witness that she, Mrs. Stewart, had gotten under the will what she wanted. that she wanted no more and no less than that; that the will was made as she wanted it, and that she was there in the family in the place of Mrs. Powell herself, the Admiral's wife; to which offer the caveatees, by their counsel, objected, and the court sustained said objection and refused to admit the testimony; to which judgment in this behalf the caveators, by their counsel, excepted, and the presiding justice entered said exception on his minutes, which it is prayed may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

[SEAL.] W. S. COX, *J.*

*Bill of Exceptions.*

III.

Be it further remembered that at the trial of this cause the caveators, to maintain the issues on their part joined, offered the testimony of Gates P. Thruston, tending to prove that subsequent to the execution of the alleged will, and during the lifetime of — Levin M. Powell, the said witness had a conversation with Mrs. Harriet C. Stewart, a specific and residuary legatee under the said will, in which the witness asked Mrs. Stewart why it was that the Weeks girls were left something in the first will and nothing in the last; that the said Mrs. Stewart replied that they tried to prejudice the Admiral against her, and she, Mrs. Stewart, had them left out of the last will on that account; to which offer the caveatees, by their counsel, objected, and the court sustained the objection and refused to admit the testimony; to which judgment in this behalf the caveators, by their counsel, excepted, and the presiding justice noted the said exception on his minutes, and it is prayed that the same may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

[SEAL.] W. S. COX, *J.*

*Bill of Exceptions.*

IV.

Be it remembered that at the trial of this cause the caveatees offered the testimony of Mr. H. Randall Webb, tending to prove that he was one of the subscribing witnesses to the alleged will; that the signature of L. M. Powell, the alleged testator, was genuine; that the signatures of Thomas F. Cogan and Henry R. Elliott were genuine; that the said Powell signed said paper in his presence and in the presence of the other two subscribing witnesses; that he and they signed in the presence of said Powell at the request of said Powell, and that, in his opinion, said Powell was at that time of sound and disposing mind; that he had been acquainted with said Powell for two or three years; had only conversed with him occasionally in a general way; that he was present in the room with the Admiral on that occasion about ten or fifteen minutes; that the will was not read to the said Powell in his presence; that he had no conversation with said Powell on that occasion; that said Powell was blind; that he could see sufficiently to distinguish day from night. The caveatees also offered the testimony of Mr. Henry R. Elliott, tending to prove that he was one of the subscribing witnesses to the alleged will; that the signatures of L. M. Powell and of himself and the other subscribing witnesses were genuine; that the said Powell signed in his presence and in
21 the presence of the other subscribing witnesses, and that he and they signed the paper in the presence of said Powell, who requested them to sign the same; that he read the whole of said paper to said Powell at that time; that, in his opinion, said Powell was at that time of sound and disposing mind; that he wrote the said will, which he copied from a draft given him by Mr. William B. Webb; that he was engaged about a half an hour in reading said paper; that when he had concluded the reading said Powell replied, "That is all; good-bye;" the Admiral was blind; that Mr. Cogan showed said Powell where to sign his name.

The caveatees further offered the testimony of Thomas F. Cogan, tending to show that at time of the alleged execution of the paper purporting to be the will of said Powell the witness was clerk to said Powell and had been since June, 1883; that he saw said Powell every day, except Sunday, during that period; that the signatures of the said Powell and of himself and the other subscribing witnesses were genuine; that he saw the Admiral sign the paper; that he (the witness) signed the paper in the presence of the Admiral and the other witnesses at the request of said Powell; that, in his opinion, said Powell was of sound and disposing mind and memory at the time he signed the paper; that said Powell was totally blind in one eye and could only distinguish between light and darkness with the other; that witness' hours of duty were from ten o'clock a. m. to three o'clock p. m.; that he (the witness), previous to his employment by said Powell, procured a letter of introduction to Mrs. Har-

riet C. Stewart, the specific and residuary legatee named in said will; that he called upon her with reference to obtaining such employment; that she stated that she would confer with said Powell about the matter; that subsequently she directed him to call upon said Powell and that it was all right; that in pursuance of her directions he called upon said Powell and that said Powell stated his terms; that he agreed to the same and his employment was thereupon perfected; that the witness was unable to state whether said Powell knew he had witnessed the will or not; that he supposed said Powell had been informed. Thereupon the caveatees read the said alleged will to the jury and announced by their counsel that this completed the formal proof of the will.

22 The caveators, to maintain the issues upon their part joined, offered the testimony of Benjamin P. Snyder, tending to show that he was the president of the National Safe Deposit Company, in the city of Washington; that said Powell rented a box or vault in the said company's office; that on or about the 3d day of January the said Powell signed an instrument in writing constituting Harriet C. Stewart, the specific and residuary legatee named in the said alleged will, as his deputy, and authorizing said company to recognize her as such and to admit her to all the rights and privileges of himself with respect to said box or vault; that the said Harriet Stewart occasionally exercised her right under such power; that the witness never knew her to come there alone, but she came either in company with said Powell or with Judge Drake.

The caveators, further to maintain the issues on their part, offered the testimony of James G. Colmesnil, tending to show that he was a second cousin of said Powell; that his mother, Sarah Courtney Colmesnil, was then living; that she was the first cousin of said Powell and of Mrs. Powell, his wife; that said Powell was the grandson of Charles M. Thruston, through Sidney Thruston, the mother of said Powell and daughter of said Charles M.; that the caveators were the cousins of said Powell, and also the grandchildren of said Charles M. Thruston; that said Powell had no sisters or brothers nor children, nor descendants of any such sisters, brothers, or children; that he knows the legatee, Susan Brand; that she was the first cousin of said Powell and his said wife, Jeannette Thruston; that the witness is acquainted with Mrs. Susan Brand; that she is now and has been for some time past in poor and necessitous circumstances; that Mrs. Colmesnil was poor, but owned a small property worth between four or five thousand dollars; that his mother knew the Admiral; that the Admiral had twice visited her in Kentucky; that the Admiral knew of her condition and seemed to regard her with a good deal of friendship; that her husband was on intimate terms with said Powell, having resided some months in his house; that he (the witness) had not been intimate with the Admiral for many years, having lived at a distance from Washington; that his mother also had lived in Kentucky for a long time past.

23 The caveators further offered the testimony of Susan Brand, tending to show that she had resided in Washington during the past thirty years; that she was the first cousin of the

said Powell and of his wife; that she had been on intimate and friendly terms with them during said thirty years; that she was sent for to come to the house to assist in cases of sickness; that she was a frequent visitor, and had staid at the house for a couple of months at a time; that she was with Mrs. Powell, aiding and attending her in her last sickness, and continued with her to her death; that the Admiral and his wife were very fond of her and treated her with kindness; that after the death of Mrs. Powell the Admiral requested her to remain to look after his comfort; that she did so for about five months and up to the time the said Powell left the city in 1881; that after his return to the city she frequently called to see him, but was not admitted to his presence; that she was informed that his physician had forbidden him to see visitors; that she knew Mrs. Harriet C. Stewart, named as a legatee in said will; that Mrs. Stewart was not a frequent visitor at said Powell's house prior to the death of Mrs. Powell; that at the time of the death of said Powell and for a number of years previous she had been poor and without any property, and that this fact was well known to said Powell; that during Mrs. Powell's last sickness the only person present at the house besides the servants, and who rendered aid and kindly offices to the family, were the two Misses Weeks; that they were very frequent visitors at the house at that time; that she and they used to read to the Admiral; that she was not admitted to see the Admiral for two years prior to the week before his death, although she called every two or three weeks; that in the three years prior to his death she was not admitted to see him over six times.

The caveators further offered testimony of Dr. William W. Johnston, tending to show that he is a physician, and has been for the past eighteen years; that he attended said Powell from the first of October, 1884, until his death; that the Admiral was totally blind; that Mrs. Harriet C. Stewart and the servants were the only other occupants of the house; that Mrs. Stewart was in the Admiral's room; that her manner towards said Powell was very affectionate; that she frequently applied terms of endearment to him, such as to call him "darling;" that he never directed that the said Powell
24 should not see visitors; that until within a week or two before his death his condition was not such as to warrant an order of that kind; that he directed the employment of a nurse for the care of said Powell because of the incompetency of Mrs. Stewart; that Mrs. Stewart complained of the nurse as being inefficient and untidy very shortly after her employment; that he knew the nurse to be very efficient; that said Powell informed him that Mrs. Stewart had spoken to him of dismissing the nurse, and he then complained of the nurse; that said Powell was absolutely dependent upon Mrs. Stewart for information as to what went on in and outside of the house; that he seemed to rely very much upon her opinion and judgment; that in the matter of the nurse he seemed to be influenced entirely by her; that Mrs. Stewart was in the habit of using alcoholic liquors to excess; that he had frequently seen her under the influence of liquor; that that was one reason for his getting a nurse, because Mrs. Stewart was not able to take

care of the Admiral; not only that she was not able to judge of his symptoms and give medicines that were ordered, but that she would give medicines that were not ordered. She was in the habit of giving stimulants to the Admiral. He had been in the habit of taking gin two or three times a day, but when she was under the influence of stimulants she would give him stimulants, and that was one object for getting the nurse, because she was injuring his health and causing him a good deal of suffering; that the Admiral died of no one disease; it was a failure of all his organs—a general and gradual breaking down of all the functions; the final symptoms were due to uræmia; that he frequently saw the Admiral from the first of October until the time of his death nearly every day, and sometimes twice a day; that he noticed Mrs. Stewart's intemperate conduct shortly after he commenced to attend the Admiral; that she was ill in bed from that cause soon after his first visit there; that she was engaged in office, and was at the house usually only at night; that she secured a leave of absence shortly after he commenced to attend the Admiral, and was in the house some weeks; that she was in charge of the house at that time; that, notwithstanding the nurse, Mrs. Stewart had a great deal to do with the personal attentions to the Admiral from the beginning to the end; that, in fact, the nurse was not a free agent; Mrs. Stewart controlled the nurse; in his opinion, said Powell's mind was clear and his intelligence unimpaired, but his mind was sufficiently enfeebled to render him subject to the influence of any one in his immediate friendship; that he found the Admiral to be influenced and controlled by Mrs. Stewart in the matter of the nurse; that in that matter he was controlled by her, and not by the witness; that it required great effort on the part of the witness to keep peace in the house; that the nurse understood her business thoroughly, and has the reputation of being one of the best in the city, and has been engaged in that occupation for twenty years; that she was entirely subordinate to and under the control of Mrs. Stewart.

The caveators further offered the testimony of M. Frank Dixon, tending to show that he was private secretary to Admiral Powell from September, 1881, to July, 1882; that he read to him, answered his letters, and attended to his business at bank; that on one occasion a photograph of a child recently born in the family had been sent to the Admiral; that Mrs. Stewart took the picture and remarked to the Admiral with reference to it, "Sending a picture to a blind man to get a present for the baby;" that on one occasion, when he was reading the Life of Christ to the Admiral, Mrs. Stewart entered the room and commanded him to stop; that she then informed the Admiral that he looked as if he were going to have a stroke of apoplexy; that after she left the room the Admiral remarked, "Some women are damn fools;" that the Admiral directed the witness to read to him his diaries covering period from 1868 to 1882; that after 1875 comments in the diaries occurred relating to Mrs. Stewart; the Admiral directed him to erase them; that Mrs. Stewart directed the witness not to leave the room when the Misses

Weeks called to see the Admiral; that the Admiral frequently told him that Mrs. Stewart complained of him (the witness); that the Admiral was blind at that time; that the erasures in the diary referred to statements of a disagreeable nature and extended to other persons than Mrs. Stewart.

The caveators further offered the testimony of George Perigo, tending to show that he knew Admiral Powell; had been a servant for him since the fall of 1872 and lived with him from that time to the day of his death; that he attended generally — the affairs
26 of the household; that he was there during Mrs. Powell's last illness; that Mrs. Susan Brand took care of Mrs. Powell during that illness; that the Misses Weeks used to visit the house every Sunday; Mrs. Brand was also a frequent visitor, but not quite so often; that during Mrs. Powell's lifetime Mrs. Brand and the Misses Weeks were received in the house and treated as members of the family; also Miss Manning, who spent several winters there; that Mr. Gates Thruston was there four times during the period of the witness' service in the house; that Mr. Archibald Atkinson, named as legatee in the will, was a friend of Mrs. Stewart's; that he had only been at the house twice within the last two years; that Mrs. Stewart always invited him when he came; witness was at the house at the time of the execution of the will in controversy; Mrs. Stewart was at home that day; after the will was executed and the gentlemen left Mrs. Stewart came out of her room into the Admiral's and asked the Admiral if it was all completed, now and forever, and the Admiral answered "Yes;" during the lifetime of Mrs. Powell Mrs. Stewart was only an occasional visitor at the house; Mrs. Stewart came to the Admiral's house a day or two before Mrs. Powell's death, and remained until the Admiral left the city; the Admiral was blind two years or more before his death; that he was confined to one floor for two years previous to his death; that he was confined to his bed between six months and a year; Mrs. Stewart resided in the house at that time and occupied a room near the Admiral's; that after Mrs. Powell's death and after Mrs. Stewart took charge of the household she caused a change in the manner of living and change in the table fare from plain food to more expensive table—a change to ducks, partridges, and such things; that the Admiral objected to this; complained of it as extravagant; that he continued to object to it for about a year, and finally told the witness to get whatever Mrs. Stewart wanted; the changes made were made by Mrs. Stewart's orders; in the management of the house the Admiral would give way to her; she would do as she pleased; that it was his duty to attend the door; that Mrs. Stewart regulated the admission of visitors and would exclude them on the ground that the Admiral was asleep or tired, or that the doctor had ordered that he should not see visitors; that the Misses Weeks called frequently, but were not very often allowed to see the Ad-
27 miral; during the past two years Mrs. Stewart was frequently intoxicated, sometimes two or three times a week; the witness also drank to excess sometimes during this period; that during this period Mrs. Stewart behaved in a demonstrative and affection-

ate manner towards the Admiral, caressing him and addressing him in terms of endearment. She was in the habit of talking baby-talk to him; when she acted in this way the Admiral would take it very quietly. The witness telegraphed to Mr. Gates Thruston to come there to assist them in taking charge of the Admiral, because the Admiral was very low, and Mrs. Stewart would not permit them—the servants in the house or the nurse—to carry out the doctor's orders with reference to the Admiral. Witness never received any orders from the Admiral not to admit visitors; he refused admission to others than Mrs. Brand and the Misses Weeks by Mrs. Stewart's orders. The persons who visited the Admiral's house during the period of the witness' servitude there were the Thrustons of Cumberland, Maryland, Mrs. Rader, Mrs. Houck, and Miss Manning. Dr. Powell came from Alexandria occasionally, but never staid long. There was no difficulty about other persons getting access to the Admiral except Mrs. Brand and the Misses Weeks. The Powells who visited there only began to visit during the year and a half next previous the Admiral's death and after Mrs. Stewart took charge of the house.

The caveators further offered the testimony of Alice Condon, tending to show that she was a professional nurse; that she knew Admiral Powell, and went to his house to nurse him on the 14th of November, 1884, and remained there until his death. The Admiral was totally blind at that time and very feeble, and required to be assisted from his bed to a chair. Mrs. Stewart was there and prevented witness from carrying out the doctor's orders with reference to the Admiral; that Mrs. Stewart misrepresented her to the Admiral, and the Admiral seemed to be guided by her representations; that Mrs. Stewart was frequently intoxicated, and she was positively and decidedly so, and it was habitual with her; Mrs. Stewart locked her out of the Admiral's room for more than three weeks out of the two months; that the Admiral complained of her not being there to attend to her duties, and she informed him that Mrs. Stewart excluded her from the room; Mrs. Stewart controlled the
28 Admiral's action to a great extent; she was with the Admiral nearly all the time that she was home; was demonstrative in her manner towards him, styling herself his Dear Harriet; she (the witness) had General Thruston telegraphed for, because of Mrs. Stewart's interference with the doctor's orders; Mrs. Stewart had said that no one should be admitted to the house except Mr. Webb, and that the witness could not send for any one without her knowledge; she therefore sent for General Thruston privately; Mrs. Stewart's manner to the Admiral and her control over him existed from the time she first went there; she heard Mrs. Stewart endeavoring to persuade the Admiral to dismiss her and the doctor; she informed him that she thought she had better leave, and the Admiral assented to it; she remained, however, until his death at the request of the physician; Mrs. Stewart interfered with the witness with reference to the Admiral's medicine in his presence; the Admiral would forbid any discussion, and would take what Mrs. Stewart would offer him; she would say, "Harriet knows what you

want." In witness' opinion the Admiral's mind was perfectly clear when Dr. Addison called to administer communion; the Admiral expressed a desire to postpone the matter to another day; Mrs. Stewart overruled him, and directed Dr. Addison to proceed; the Admiral submitted, and said nothing more.

The witness ALICE CONDON was interrogated and answered as follows on cross-examination:

"Question. He drank gin constantly, did he not?

Answer. The doctor ordered him to take it from her when she ordered it.

Q. When you went there, in what condition was the Admiral's mind so far as his ability went to engage in conversation with you or with other people?

A. I think his mind was clear.

Q. When did you observe that there was any difficulty or cloudiness about the Admiral's mind? How long prior to his death did anything of that kind occur, if at all?

A. I think it was perhaps two weeks before he died; he was getting forgetful; did not remember as well, although he remembered something, and his mind was clear to a certain extent to the last half hour before he breathed his last.

29 Q. Was he in the habit, after you went there, of discussing other topics outside of his own infirmities?

A. Yes, sir.

Q. Did you ever hear him discuss political questions?

A. With Mrs. Stewart.

Q. Did he not talk with any one else?

A. Yes, sir. I think his mind was clear on almost any subject or anything that he undertook to discuss. I think he was capable of discussing anything he undertook to discuss.

Q. You think so?

A. Yes, sir.

Q. Did you ever hear him talk to Judge Drake and Mr. Webb?

A. Yes, sir; both of them.

Q. And the doctor?

A. Yes, sir; his mind was perfectly clear.

Q. He talked as well as anybody could and better than a good many other people?

A. I think he knew what he was talking about.

Q. You do?

A. Yes, sir.

Q. Were you present when the clergyman administered communion to the Admiral—Dr. Addison, I think it was; possibly Dr. Leonard?

A. It was Dr. Addison.

Q. You were present, were you?

A. Yes, sir.

Q. Did he seem to be aware of what was going on thoroughly?

A. I think the Admiral sent for Dr. Addison in regard to some

business matter. I do not think he sent for the minister to administer the Lord's Supper. I think he sent to the minister in regard to some business matters. I don't think he sent for him at the time to have the Lord's Supper administered. He made the remark that he was not ready for that. He wished to attend to the business matter, and insisted that that should be attended to—that first; and after that was attended to Mrs. Stewart was in the room and she insisted upon him to have the other matter attended to at that time, too, and it was attended to.

Q. What was the business Dr. Addison was sent for to attend to; do you know?

30 A. The Admiral wished to divide $100 between, I think, Dr. Addison and some other clergyman.

Q. Dr. Forrest?

A. I think that was his name. He wished to have that attended to, but Mrs. Stewart wished to have the other matter attended to at first, and then Mrs. Stewart said, "Never mind, you can attend to the business matter first," which he did, and he said that he would not attend to the other matter that day. Mrs. Stewart overruled him, and said it must be attended to now; and she said to the doctor (Addison), "Proceed;" and Doctor Addison did proceed, and the Admiral said nothing more.

Q. And the communion went on?

A. Yes, sir.

Q. And then the business was attended to?

A. The business was attended to at first. She said no, it could not be attended to at first.

Q. When did all that take place—how long before Admiral Powell's death?

A. I think about eight or ten days, though I may not be correct; I think within two weeks; I think about ten days.

Q. Now, in reference to this conversation which you overheard, will you state to the jury where that took place; the Admiral was in the southern corner of the house, was he not; the house fronts to the south, and he was on the east side of the hall, in that room right opposite to the little room where the office was, was he not?

A. Yes, sir.

Q. Where were you?

A. I was in the office.

Q. Was the door shut?

A. The door was locked; Mrs. Stewart had locked it on the inside.

Q. Locked on the inside of the Admiral's room?

A. Yes, sir.

Q. You were on the outside?

A. I was on the outside and the door was locked on the inside.

Q. How did you hear—the door being closed?

A. The head of the bed was near the door, and I heard my name called. I sat there still when I heard my name called, and I heard what was said.

31 Q. Were you sitting down or standing?

A. I was sitting at the window sewing.
Q. How long had you been there when you heard your name?
A. I was not listening, but hearing. I did not know what they were talking about; but when I heard my name called I listened. I concluded that if they locked the door it would be better that I should listen. I sat still and heard what they said."

The caveators further offered the testimony of Miss Mary E. Weeks, tending to show that she was a third cousin of the Admiral's and had been acquainted with him for about twelve years. She was also a third cousin to his wife. She was very intimate with both the Admiral and his wife—a very frequent visitor; frequently stayed at the house two or three days at a time. The Admiral and Mrs. Powell were very kind to her—treated her as a member of the family. They both treated Mrs. Brand very kindly and expressed very kindly feelings towards her to the witness. Mrs. Brand nursed Mrs. Powell during her sickness and seemed to regard her with a great deal of affection. She heard the Admiral and Mrs. Powell both express sympathy for Mrs. Brand's needy condition. Witness used to visit the house almost daily and read to and write for the Admiral. Witness was repeatedly refused admission to the Admiral's house on the ground that he was too sick to be seen. Previous to that time she had never been refused admission to the Admiral's room, even during his sickness. Frequently she saw Mrs. Stewart, and Mrs. Stewart would say that the Admiral was too ill to see her. From April or May, 1884, until the time of his death she did not gain admission to see the Admiral more than four or five times. During that time she called at the house, for the purpose of seeing him, three or four times a week; the Admiral was in a very feeble condition during the last year of his life, but the witness thought that his mind was clear; for six or seven months prior to his death she would not converse much with him for fear of tiring him; she noticed some confusion in his memory; in talking about relations he would get generations confused; he would confound events connected with witness' generation with the generation of her
32 grandparents. The Admiral regarded her (the witness) and treated her with great affection. On one occasion when witness called to see the Admiral she was standing at the door of the adjoining room. Mrs. Stewart went up to his bed and said to him, "I want to speak to you about Mary and Fanny Weeks." He said, "Go away; this must be put a stop to; I must be left absolutely alone." He was not aware that witness was in the room. Archibald Atkinson was a very near friend of Mrs. Stewart's. Witness never heard of him in connection with the Admiral during her twelve years' acquaintance. At the time of the funeral Mrs. Brand was at the house. Mrs. Stewart told witness not to leave without taking Mrs. Brand away.

Caveators further offered the testimony of Miss Fannie H. Weeks, tending to show that she was the third cousin of the Admiral and of his wife; was a very frequent visitor, and was treated as a member of the family. Before Mrs. Powell's death she used to read and

write for the Admiral. Previous to August, 1881, the Admiral would send for her nearly every day to come and read to him. After that time she (the witness) had great difficulty in seeing the Admiral and was seldom admitted. In the evening Mrs. Stewart would refuse her admittance and say that the doctor had forbidden him to see any one. Witness called twenty-one days in succession, but was refused admittance to the Admiral. During Mrs. Powell's lifetime the Admiral indicated by his manner his dislike for Mrs. Stewart. Mrs. Powell stated to the witness in the summer of 1880, just previous to her death, that she had a great deal of trouble to make the Admiral act well towards Mrs. Stewart, and that Mrs. Stewart gave him much trouble and he made frequent complaints about it; that Mrs. Stewart angered him by taking his moss roses. He expressed himself very warmly about it, and said that if she (Mrs. Stewart) were permitted to go on she would take possession of everything that was there. On one occasion—in November or December—previous to the Admiral's death, the Admiral complained to witness that Mrs. Stewart had been sick and the servants had been sick, and that he had been lonely. Witness asked him why he had not sent for her, and he replied that Harriet said she could not come. On one occasion witness had made a pair of boots of soft material for the Admiral and sent them to him
33 as a present, and subsequently the Admiral told the witness that Mrs. Stewart had informed him that she (Mrs. Stewart) had paid the witness two dollars and a half for the boots. Witness told the Admiral that it was a mistake. It was untrue that she had been paid anything. She had sent the articles as a voluntary gift.

The caveators further offered in evidence the inventory of the personal estate of the said Powell, showing it to amount to $85,028.40.

Caveators further offered in evidence a former will and codicils, duly executed by said Powell, dated the 3d of August, 1882, hereto annexed and marked "Exhibit A" and made part of this bill of exceptions, containing a legacy to the Misses Weeks for fifteen hundred dollars.

EXHIBIT A.

In the name of God, Amen. I, Levin M. Powell, of Washington city, in the District of Columbia, being of sound and disposing mind, memory, and understanding, knowing the certainty of death and the uncertainty of the time thereof, and being desirous so to arrange my worldly affairs that I may be the better prepared to leave this world when it shall please God to call me hence, do make, publish, and declare this, and this only, as and for my last will and testament:

Item. First and principally, I commit my soul to Almighty God and my body to the earth, to be buried in such manner as to my executors, to be hereinafter named, shall seem, my condition in life duly considered, most fit and proper; and after all my funeral expenses and just debts, if I have any, are paid, I dispose of my estate in manner and form as follows, to wit:

Item. Second, I direct that my entire estate—real, personal, and mixed, of whatever consisting and wheresoever situated, except in so far as I shall otherwise herein specifically devise or provide—shall be taken by my executors hereinafter named, or the survivor of them, and shall be by them sold at as early a day as practicable, upon such terms and conditions as to them shall seem best and most advantageous for all persons concerned, and so that the best price can be obtained therefor, and that the proceeds arising
34 from such sale shall be by my said executors distributed and paid over to the persons hereinafter named in the sums and upon the terms and conditions hereinafter set forth and contained—that is to say, to Jeannette T., daughter of Mrs. M. J. Manning, of Baltimore, Maryland, known as Nettie, the sum of two thousand dollars; to Mrs. Bessie Thruston, widow of George A. Thruston, late of Cumberland, Maryland, deceased, five thousand dollars absolutely, and in addition thereto the sum of five thousand dollars, to be by her taken and held in trust for her present unmarried daughters, Susan and Violet, the income arising therefrom to be used by her during her lifetime, and it is my desire that no bond shall be required of her as security for the faithful performance of this trust; to Mrs. Charles B. Thruston absolutely, one thousand dollars, and in addition thereto three thousand dollars, to be by her taken and held in trust for her unmarried daughters and son Charles, the income arising therefrom to be paid to them in equal proportions when they respectively arrive of age, and until that time the income to be used by her, and it is my desire that no bond shall be required of her as security for the performance of said trust; to Mrs. Jeannette Thruston Rader, wife of Dr. William H. Rader (to whom I have recently given the property in Cumberland, Maryland, formerly owned by the late General Charles M. Thruston, and by me purchased, in order that the same may be a comfortable home for them), the sum of nine thousand dollars; to Gates P. Thruston and his sister, Mrs. Houk, six thousand dollars, to be equally divided between them; to Alfred Buckner Thruston, son of Alfred Thruston, deceased, three thousand dollars; to my friend Walter D. Davidge, in trust for Maria Gillis Bradley, daughter of Dr. William A. Bradley, deceased, late of the United States Army, and Powell Bradley and Frederick W. Bradley, his sons, the sum of three thousand dollars, to be by him applied in his discretion to their support and maintenance in the following proportions: Two thousand dollars for said Maria Gillis Bradley and five hundred dollars to each of the said sons; to Charles S. Powell, of Alexandria, Virginia, son of Cuthbert Powell, deceased, three thousand five hundred dollars; to Doctor Robert C. Powell, of Alexandria, one thousand dollars; to Cuthbert L. Powell, of Danville, Virginia, brother of Doctor Robert C. Powell, one thousand dollars; to the Reverend Cuthbert L. Powell, son of Cuthbert
35 Powell, deceased, fifteen hundred dollars; to Virginia Taylor, widow of Lawrence B. Taylor, of Alexandria, Virginia, one thousand dollars; to Harriet Chilton Stewart, widow of Charles Stewart, deceased, ten thousand dollars; to Daniel B. Conrad, late

of the United States Navy, one thousand dollars; to William B. Webb, three thousand dollars, to be by him taken and held in trust for Mrs. Brand, my first cousin, and daughter of my aunt, Eloise Taylor, deceased, of Louisville, Kentucky, for and during her natural life, the income thereof to be paid to her during that time, and upon her death, in further trust, to pay the said sum of three thousand dollars to the trustees of the Garfield Memorial Hospital, recently organized, or other persons having the control of the affairs of that institution; to my good friends, William G. Moore and William S. Mitchell, both of Washington city, as a testimonial of my regard for them and by way of acknowledgment of their many kindnesses to me, five hundred dollars each; to my cousins, Mary and Fanny Weeks, of Washington city, one thousand dollars, to be equally divided between them; to my friend, Charles D. Drake, in remembrance of the many kind services he has rendered me during our long-continued friendship, two thousand five hundred dollars; to Mrs. Lucy L. Powell, one thousand dollars; to M. Bedford Calwell, five hundred dollars; to Mrs. Mary Chilton Lee, widow of the Rev. Mr. Lee, now living at Louise Home, in Washington city, one thousand dollars. It is my will and desire that if any of the parties to whom I give legacies in this my will prefer to take bonds instead of money in the payment of such legacies, he or she may be permitted so to do by taking any such bond or bonds at the then market value thereof in cash; and it is my further desire and will that any of the said legatees who shall in any way obstruct or hinder the execution of this will shall forfeit the payment of any legacy herein provided to him or her, and I hereby direct my said executors to refuse to pay any such legacy.

Item. Third, I give, devise, and bequeath to Gates P. Thruston the picture of Washington, by Peale, and the two oil paintings hanging in the niches of the east side of the front parlor of my residence; to Robert C. Powell, of Alexandria, Virginia, the portraits of the Powell family, except the one of myself, of which I die
36 possessed; the picture by Church, in the dining-room of my residence, I give to my friend, William B. Webb; the picture of Piney Point, in the same room, to Mrs. Jeannette Thruston Rader; the picture of the Mouth of the Po to my friend, Joseph H. Bradley; all the other pictures in my residence, except those particularly devised, I give to Mrs. Jeannette Thruston Rader; all the pictures of the Bradley family belonging to me I give and devise to Mrs. Walter D. Davidge to take and hold for Maria Bradley, daughter of Doctor William A. Bradley, until she shall be satisfied to deliver them into her keeping; the engraving of the picture of Bierstadt, which hangs in the reception-room of my residence, I give to my friend, Charles D. Drake, and I also give and bequeath to him all of my correspondence and official records, to be by him taken and disposed of as he shall think fit; to Mrs. Drake, the wife of Charles D. Drake, I give one of the Persian table covers in my back parlor, and the other to Mrs. Jeannette T. Rader; to George Perego, my servant, if he is in my service at the time of my death, I give three hundred dollars, and if he shall have left my service before that

time, one hundred dollars; to Doctor Alfred H. Powell, of Baltimore, Maryland, I give the sum of one thousand dollars; to Catharine, called Kate, daughter of Dr. Llewellen Powell, deceased, of Louisville, Kentucky, I give the sum of one thousand dollars, and to Maria Powell, of Fauquier county, Virginia, daughter of John Levin Powell, deceased, I give the sum of one thousand dollars, and hereby direct my executors to pay the said several sums to said persons, respectively.

Item. Fourth, I direct that the rest and residue of my estate remaining after the payment of my debts, funeral expenses, and the foregoing legacies shall be equally divided among the following persons—that is to say, Mrs. Jeannette T. Rader, Mrs. Bessie Thruston, Mrs. Charles B. Thruston, Mrs. Harriet C. Stewart, and Gates P. Thruston, and his sister, Mrs. Houk, wife of George W. Houk, jointly one part of the residuum—or such of them as shall be living at the time of my decease.

Item. Fifth and lastly, I do hereby nominate, constitute, and appoint Charles D. Drake and William B. Webb, of Washington city, in the District of Columbia, to be the executors of
37 this my last will and testament, and it is my will and desire that they be not required to give the bonds usually exacted for the faithful performance of their duties as such executors, or, if this cannot be done, that in view of the fact that I owe no debts, that the penalty of such bond may be made only nominal; and in order to expedite, as far as possible, the immediate settlement of my estate, I give, devise, and bequeath to each of my said executors the sum of two thousand five hundred dollars, to be by them taken in lieu of all and every commission or allowance for their services as executors of this will, hereby revoking and annulling all other wills by me made, and hereby declaring this and this only to be my last will and testament.

In testimony whereof I have hereunto set my hand and seal this 3d day of August, A. D. 1882.

L. M. POWELL. [SEAL.]

Signed, sealed, published, and declared by Levin M. Powell, the above-named testator, as and for his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

W. H. RUFF.
M. FRANK DIXON.
HENRY R. ELLIOTT.

Whereas I, Levin M. Powell, of Washington city, in the District of Columbia, have made and duly executed my last will and testament, bearing date the third day of August, 1882, which said last will and testament and every clause, bequest, and devise therein contained I do hereby ratify and confirm, saving and excepting such clauses and bequests therein mentioned as are by me hereinafter revoked and made void, and being desirous to alter some parts thereof and of making additions thereto, do therefore make this my

codicil, which I will and direct shall be taken and held as part of my said will and testament, in manner and form following—that is to say:

Whereas by my said last will I did give and bequeath unto Mrs. Charles B. Thruston, absolutely, one thousand dollars, now I do hereby revoke the said legacy.

38 And whereas I did give and bequeath to Mrs. Charles B. Thruston, in addition to the said sum of one thousand dollars, the sum of three thousand dollars, to be by her taken and held in trust for her unmarried daughters and son Charles, the income arising therefrom to be paid to the said beneficiaries in equal proportions, and so forth, now I do hereby revoke and annul the said legacy, and in lieu thereof I do hereby give and bequeath to the said Mrs. Charles B. Thruston the sum of three thousand dollars, to be taken and held by her in trust for her unmarried daughters and her son Charles, the income to be used by her, the said Mrs. Charles B. Thruston, for her own purposes during her natural life, and upon her death the said sum of three thousand dollars, to be divided among her children living at that time, share and share alike, and it is my desire that no bond be required for the faithful performance of this trust.

And whereas by my said last will I did give and bequeath to Mrs. Bessie Thruston, widow of George A. Thruston, late of Cumberland, Maryland, five thousand dollars absolutely, and in addition thereto the sum of five thousand dollars, to be by her held upon certain trusts in my said will particularly set forth and declared, now I do hereby revoke the said legacies, and I do hereby give and bequeath to Julian H. Thruston the sum of ten thousand dollars, to be by him taken and held in trust for the benefit of his mother, Mrs. Bessie Thruston, and his unmarried sisters; said sum to be invested and the income arising from such investment paid in equal portions to his mother and his unmarried sisters; and upon the marriage or death of either of his said sisters, such income to be paid in equal parts to his mother and such of said sisters as survive and remain unmarried; this trust to continue during the life of Mrs. Bessie Thruston, and upon her death it is my will that the said sum so held in trust shall be divided equally among the children of the said Mrs. Bessie Thruston that may survive her; and I do further give and bequeath to the said Julian H. Thruston the sum of five hundred dollars as a compensation to him for his services in and about the foregoing trust, and it is my desire that no bond shall be required of him for the faithful performance of the said trust, unless Mrs. Bessie Thruston shall require such bond to be given.

39 And whereas by my said last will I did direct that the residue of my estate, after paying debts and legacies, should be equally divided among the following persons—that is to say, Mrs. Jeannette T. Rader, Mrs. Bessie Thruston, Mrs. Charles P. Thruston, Mrs. Harriet C. Stewart, and Gates P. Thruston and his sister, Mrs. Houk—now I do hereby annul and revoke the said provision, and in lieu thereof do direct that the said residue shall be divided equally among the following persons, to wit: One share

each to Mrs. Jeannette T. Rader, Mrs. Bessie Thruston, Mrs. Harriet C. Stewart, and the remaining share to be divided so as to give to Gates P. Thruston one-half thereof and to the present unmarried children of his sister, Mrs. Houk, the other part thereof, the share hereby given to the children of Mrs. Houk to be taken and held by Gates P. Thruston in trust for such children, the income to be applied to their use until the youngest attain the age of twenty-one years, and then said principal sum to be divided among said children equally.

In testimony whereof I have hereunto set my hand and seal this 11th day of October, A. D. 1883.

LEVIN M. POWELL. [SEAL.]

Signed, sealed, published, and declared as and for a codicil to his last will and testament by the said Levin M. Powell, in our presence, who, at his request and in his presence and in the presence of each other, have hereunto set our hands as witnesses thereto.

THOS. F. COGAN.
HENRY R. ELLIOTT.
H. RANDALL WEBB.

Whereas I, Levin M. Powell, of Washington city, in the District of Columbia, did, on the third day of August, 1882, make, publish, and declare my last will and testament, and on the eleventh day of October, 1883, did also make, publish, and declare a codicil thereto, which said last will and testament and codicil I do hereby ratify and confirm, saving and excepting in so far as the same are hereinafter changed; and whereas I am desirous to revoke some and alter and change others of the provisions of the said will and the codicil thereto: Now, I do make this the second codicil to my will, which I will and direct shall be taken and held as part of my said last will and testament, in manner and form following—that is to say:

Whereas by my said last will and testament I did give and devise to Alfred Buckner Thruston, son of Alfred Thruston, deceased, the sum of three thousand dollars, and it is my desire in the event that the said Alfred Buckner Thruston should die before I do that the said legacy to him should not lapse, but should go to the wife and children of the said Alfred Buckner Thruston, now I do hereby give, devise, and bequeath the said sum of three thousand dollars to the said Alfred Buckner Thruston, and in case of his death during my life to his wife and children surviving him, share and share alike, and I hereby direct my executors to pay the same in the manner provided; and whereas in and by the codicil to my said last will and testament I did direct that the residue of my estate should be equally divided among the following persons—that is to say, Mrs. Jeannette T. Rader, Mrs. Bessie Thruston, Mrs. Charles B. Thruston, Mrs. Harriet C. Stewart, and Gates P. Thruston, and his sister, Mrs. Houk—now I do hereby annul and revoke the said provision, and in lieu thereof do direct that the said residue of my estate shall be divided equally among the following persons, to wit, Mrs. Jeannette P.

Rader, Mrs. Bessie Thruston, and Mrs. Harriet C. Stewart, share and share alike; and whereas in and by said last will and testament I did give and devise to Mrs. Jeannette T. Rader the sum of nine thousand dollars, now I do hereby annul and revoke the said provision, and in lieu thereof do hereby give, devise, and bequeath to Mrs. Jeannette T. Rader the sum of five thousand dollars; and whereas I did give and bequeath by my said last will and testament to the Reverend Cuthbert L. Powell, the son of Cuthbert Powell, deceased, the sum of fifteen hundred dollars, now I do hereby revoke and annul the said bequest, and in lieu thereof I give, devise, and bequeath to my cousin, Charles Sims Powell, of Alexandria, Virginia, the sum of fifteen hundred dollars, the same to be taken and held by him in trust for the said Cuthbert L. Powell and Levin Powell, the brother of said Cuthbert L. Powell, the income derived therefrom to be divided between the said Cuthbert L. and Levin Powell during their joint lives, and the principal sum to be paid by said trustee to the survivor, his executors, administrators, or assigns; and whereas I did also, in and by said last will and testament, give, devise, and bequeath to my
41 cousins, Mary and Fanny Weeks, of Washington city, one thousand dollars, to be equally divided between them, now I do hereby revoke and annul said bequest, and in lieu thereof I do hereby give, devise, and bequeath to my said cousins, Mary and Fanny Weeks, the sum of five hundred dollars, to be equally divided between them; and I do hereby further give, devise, and bequeath my portrait, painted by William H. Powell, the artist, to the Naval Lyceum of the Navy Yard at New York, of which I have been a member for thirty-five or forty years.

In testimony whereof I have hereunto set my hand and seal this eighteenth day of April, A. D. 1884.

L. M. POWELL. [SEAL.]

Signed, sealed, published, and declared as and for a second codicil to his last will and testament by the said Levin M. Powell, in our presence, who, at his request and in his presence and in the presence of each other, have hereunto set our hands as witnesses thereto, the name of Mrs. Charles B. Thurston, second page, fifteenth line, of this second codicil, being first stricken out.

JAS. H. WATMAUGH.
H. RANDALL WEBB.
HENRY R. ELLIOTT.

The caveators further offered the testimony of Miss Fannie H. Weeks, tending to show that in January, 1884, she informed the Admiral that General Hunter had stated to her (the witness) that he had called to see the Admiral and had not been admitted; that the Admiral became much excited and remarked that he thought he should be allowed to be master of his own house and to decide for himself whether he would receive or dismiss visitors.

Caveators further offered in evidence the testimony of Miss Mary E. Weeks, tending to show that she had had a conversation with the

Admiral in the fall of 1881 in the city of Baltimore. In that conversation the Admiral stated to the witness that if he could not get his house to himself and get rid of Harriet Stewart he would take his servant George and go to Aiken, South Carolina, or go to Wormley's annex on I street.

The caveators further offered the testimony of Susan
42 Hill, tending to show that she was acquainted with Admiral and Mrs. Powell, and had been a servant in the family for twelve or thirteen years; that she knew Mrs. Susan Brand; that Mrs. Brand nursed Mrs. Powell in her last illness, and remained there and waited upon the Admiral and did his mending after Mrs. Powell's death; that Mrs. Brand ceased her attentions in this respect because Mrs. Stewart had directed the witness not to permit Mrs. Brand to continue her attentions and services; that she (Mrs. Stewart) did not wish her to do anything in the world for the Admiral; that it was the witness' duty to attend to the clothes, and that she used to give the same to Mrs. Brand; that Mrs. Stewart forbade her giving them to Mrs. Brand, and she so informed Mrs. Brand. And thereupon the caveators rested their case.

Thereupon the caveatees offered in rebuttal the testimony of Mr. Thomas F. Cogan, tending to show that he was clerk to the Admiral and attended to his correspondence; that the Admiral's mind was clear and bright up to a short time before his death; the principal correspondents that the Admiral had were Gen'l Thruston, Mr. Buckner Thruston, some folks in Cumberland, Maryland, Mrs. Rader, Dr. Rader, Miss Bessie Thruston, of Cumberland, and very frequently Dr. Powell, of Baltimore; never wrote any letters to Mrs. Colmesnil, of Kentucky or Texas; never heard the Admiral mention her; that the custom in the Admiral's house with reference to visitors was to have the card or name sent up to him, and if the Admiral wished to see the party he would say so; if not, he would send his regards or a statement that he was busy, or something to that effect; he frequently saw the Misses Weeks there during his period of service; on one occasion when the Admiral was not feeling well the Misses Weeks called to see him, and after they left the Admiral remarked that they enfiladed him; the witness identified numerous checks written by him and signed by the said Powell during the period commencing shortly before the date of the alleged will and subsequent thereto in payment of bills and settlement of other business transactions of the Admiral's; that he conversed with the admiral and read to him, and that the Admiral's mind appeared
clear, his understanding good; he was blind and physically
43 very feeble; the witness became secretary to the Admiral through the instrumentality of Mrs. Stewart; she and the witness were quite friendly.

The caveatees further offered the testimony of James C. Welling, LL.D., tending to show that he was well acquainted with Admiral Powell; became acquainted with him in 1860; did not see him very frequently during the years of his life; that he saw the Admiral some time in latter — the month of October and had a conversation with him with reference to the devise in the will to the

Columbian University; that the Admiral explained his proposed scheme in that respect to the witness with perfect clearness. The witness considered him perfectly sound in mind. The Admiral was a positive and emphatic man, and the witness noted the continuance of this characteristic. The witness had seen the Admiral several months before. He was physically weak, but in the witness' opinion his mind was clear. The Admiral was practically blind.

The caveatees further offered the testimony of Gates P. Thruston, tending to show that he was acquainted with Admiral Powell since he (the witness) was four years old; that the witness was the second cousin to the Admiral and a nephew of the Admiral's wife; that the witness was familiar with the family history of the Powells. Since the Admiral arrived at manhood he (the Admiral) and the Powell family had not been very intimate; they were alienated. Witness was intimately acquainted with the Admiral; had frequently visited his house and been his guest there. The Admiral indicated a special fondness for Sidney Buckner and Jensie Thruston. The Admiral always expressed himself as interested in the witness' branch of the Thruston family. In the witness' opinion the Admiral's mind was as strong as ever it had been up to a short time before his death. The witness is one of the legatees under the will and thinks he would take nothing if the will were set aside. Witness had not endeavored to persuade George Perigo not to testify for the caveators. He wrote and sent George Perigo the following letter:

"STATE INSURANCE COMPANY,
NASHVILLE, TENNESSEE, *April* 1*st*, 1885.

FRIEND GEORGE: I got your letter, but have been so pressed with duties that I have not been able to reply sooner. There
44 ought to be no trouble about the will; it will surely be sustained. Of course I did not realize there could possibly be people foolish enough to try to break it, and I was thoughtless enough not to be very careful with my tongue. I especially never tho't about the Weeks cousins joining the enemy. Speaking confidentially to you, I did tell them your remark about what the admiral said about Mrs. S. and the nurse fussing about the medicine. When you are called they may ask you about that, and of course you may have to tell what was said. There is nothing in it that should hurt the will; quite the contrary; still, for the sake of all concerned, it's best to say as little as possible, and nothing at all, if it isn't nec'y or forced. No one can tell what I said, as that would be only hearsay; but they may ask you what you told me. They can't disprove any reply you make. I hope all will come out well and that you are getting on comfortably. Remember to Virginia.

With regards, G. P. THRUSTON."

The caveatees further offered the testimony of Rev. THOMAS G. ADDISON, a witness on behalf of the propounders of the will, —, being first duly sworn, testified as follows:

By Mr. TOTTEN:

Question. What is your profession?

Answer. I am an Episcopal clergyman.

Q. Did you know Admiral Powell during his lifetime?

A. Yes, sir.

Q. Were you well acquainted with him?

A. Yes, sir.

Q. For how long a period of time?

A. For about eighteen years. I was acquainted with him from about the time I came to Washington to live as the rector of Trinity church.

Q. Do you remember the occasion or the circumstance of the administration of the holy communion to Admiral Powell for the last time?

A. Yes, sir.

Q. Will you state, as nearly as you can recollect, what occurred there?

A. The whole thing?

Q. Yes, sir.

45 A. I received a communication from Admiral Powell's household—I think from Mrs. Stewart, but I am not positively certain about that—yes, it was from Mrs. Stewart, I would say—to call and see Admiral Powell. I went as soon as convenient and found the captain in bed, sick.

Q. You mean the Admiral?

A. The Admiral. He was very feeble. I had some little conversation with him and prayed with him. After that I spoke to him about the subject of his partaking of the holy communion. I say he was very feeble. At first he seemed to be reluctant. I held my head down for him to tell me why. The Admiral said, "Business first, business first." I said to him, "Admiral, I would not think about business now; you are a very sick man; you had better think about your spiritual welfare." The Admiral said, "No; business first." I said, "What business?" It seemed he had a hundred dollars which he wished to give to Dr. Forrest, who was my associate in the rectorship of Trinity church, or had been my associate, and to me. In a few moments a young man—he had given direction to have a check made out, and the check was handed to me without the Admiral's signature. I told the Admiral to make his mark in the presence of the persons there, and he made his mark after I had signed his name. There were several witnesses who signed their names as witnesses to his mark. That was the business he desired to have attended to before he partook of the holy communion; then he was ready to partake of the holy communion. I administered it to him.

(The witness was here handed the check referred to.)

The WITNESS: This Levin M. Powell is written in my hand. This is the check and that is my signature on the back. When this matter of business had been completed the Admiral was ready to partake of the holy communion. I proceeded to administer it to

him. During the service he seemed to be very much engaged in the service, and at the end of the prayers each time uttered quite an audible amen. Shortly after that I retired.

Q. Was there any objection made by him at any time during your visit to his partaking of the holy communion?

A. Until the business was done. He said, "We must do the business first." There was no reluctance manifested outside of that.

46 Q. Did anybody outside interpose in the conversation?

A. I think that his relative desired that before his death he should take the holy communion, and I think she expressed herself to me.

Q. I mean on that occasion. I want to know whether the Admiral was reluctant to take communion at all; and, if so, whether any argument was made to him on that subject.

A. No argument was made to him on that subject; not that I know of. He was not overruled by anybody. I would not have been willing to administer the holy communion had he been unwilling to receive it; not in any sense.

Cross-examination by Mr. J. J. JOHNSON:

Question. Did the Admiral desire to postpone the communion to another time?

Answer. He said, "Business first." He wanted to attend to that business first.

Q. Who was present in the room?

A. There were, I think, four or five persons present; there was a young man who was his clerk; there was a colored servant, Mrs. Stewart, and perhaps two others—one or two others; I did not know the persons; they were not known to me.

Q. You are, then, positive that the Admiral did not desire to have postponed the administration of the sacrament to another day—I mean on that occasion?

A. Oh, yes, sir; I am positive of it.

Q. And that Mrs. Stewart said, "No; let it be done now?"

A. I am positive that he did not wish a postponement of it other than this—that the business must be attended to first.

Q. I will repeat the question. Are you positive that the Admiral did not desire the postponement of the administration of the offices of the church until another time, and that Mrs. Stewart said, "No; let it be done now?"

A. I had no intimation that he desired a postponement to another occasion.

Q. Was that conversation had—the one which I have repeated to you?

A. I have no recollection of it.

47 Q. Will you say that that conversation did not occur?

A. I have no recollection of it at all; it may have occurred without my cognizance. She may have said something to him without my knowing anything about it; but she could hardly do so, for I was right at his bed.

Q. Will you say that such conversation did not take place?

A. I will say that such conversation did not take place in my hearing.

Q. If it did take place you did not hear it?

A. I did not hear it if it did take place; but I think I could have heard it had it taken place.

Q. How long were you there?

A. It is little difficult for me to say; my recollection is that I had some talk with the Admiral when I first went in, and knelt down and had an extemporaneous prayer with him, and then attended to the business which he desired to have attended to—the business about the check—and then, after finding out what he wanted, proceeded to administer the communion to him, and left; he was very feeble.

Q. Did he say anything at all after the check transaction?

A. Yes, sir.

Q. What did he say?

A. Really I do not know just what his words were, but I sought to find out whether he wanted the holy communion administered to him. I found that he did, and I proceeded to administer it. I could not have administered it without his consent and expressed desire.

Q. Did he say anything immediately after the disposition of that piece of business?

A. Yes, sir; we did have a talk after that, and my impression of that talk was that he wished the holy communion administered to him.

Q. Do you remember the words?

A. No, sir.

Q. All that is on your mind is an impression or inference drawn from what he said?

A. All that I remember is that I had a conversation.

Q. If you had a conversation do you remember the words of the conversation?

A. No, sir; all I know is that the result of the conversation was I administered the communion.

48 Q. You are giving the inference that you drew from what he said, and not his words?

A. If a man speak to me and tell me that he wants a thing done, I do not draw any inference from his words.

Q. You must, unless you can give his words?

A. I had no difficulty in understanding Admiral Powell at all. I proceeded to do what the Admiral wanted me to do.

Q. I want the exact language.

The COURT: The doctor has said that he cannot give the exact language.

The caveatees further offered testimony of Charles D. Drake, one of the caveatees and named as one of the executors in the will, tending to show that he had known Admiral Powell since 1827; that he had been very intimately acquainted with the Admiral ever since March 3d, 1869, and also with Mrs. Powell; that the Admiral

was a very positive man, and in the witness' opinion a man of strong self-assertion. In the witness' opinion he retained his full mental strength and vigor up to a few days before his death. In the fall of 1881 Mrs. Stewart came to the Admiral's house, sleeping there at night and going to her office during the day. At that time she retained a room in the house where she had been boarding. In the winter following witness advised the Admiral to have her reside permanently in the house; subsequently she came there and took up her abode. In the witness' opinion the Admiral was capable of making a valid deed or contract in October, November, or December, 1884; that the value of the house devised to the Columbian University is about $20,000.

The caveatees further offered the testimony of WILLIAM B. WEBB, one of the defendants, and a witness produced on behalf of the propounders of the will —, being first duly sworn according to law, was examined, and testified as follows:

Direct examination by Mr. TOTTEN:

Question. What is your business?

Answer. I claim to be a lawyer.

Q. You say you profess to be one?

49 A. Yes, sir; I profess to be a lawyer; I hold myself out to the world as such.

Q. Did you know Admiral Powell?

A. Very well.

Q. And drew his will?

A. Yes, sir; I made his acquaintance first when I was a boy—a school-boy—and we boarded in the same house. Soon after I came to the bar—not very long after I came to the bar—I was employed to procure a partition or the sale of the estate of Buckner Thruston.

Q. Who was he?

A. One of the judges of our circuit court when he died. He was the father-in-law of Admiral Powell and his uncle. During Judge Thruston's life, while Mrs. Powell was a spinster, she had conveyed to her two pieces of property in the city of Washington, which I unfortunately included in the bill which I had put in for the purpose of bringing the property into hotch-potch. Admiral Powell called on me, and my acquaintance in a business way began then. I found that I had made a mistake by including these two pieces of property, which were withdrawn from the bill. One piece of property was a house on Pennsylvania avenue, formerly occupied by an old man named Garrett Anderson as a music and stationer store. The other piece was the property on Third street, which belonged to Mrs. Powell and had been conveyed to her by her father.

Q. Is that the whole of the judge's estate?

A. Those are the two pieces of property of the largest value, I think, belonging to the judge's estate. It turned out when we came to sell the estate that a square of ground out here in the northern part of the city that nobody thought of any particular value had become quite valuable, and we sold it for a good, large sum of money;

I forget exactly what. Mr. Joseph Bradley, Jr., and myself were cotrustees to sell the estate. I was afterwards, some years afterwards, employed by Admiral Powell to settle up the trust which Judge Thruston created during his lifetime to produce an annuity for a weak-minded son he had. Judge Thruston had a son named William, who was taken care of by his father by a deed or mortgage charging his entire estate with an annuity for the benefit of his son, and from the money realized from the sale of the judge's estate the court made provision for the production of this
50 annuity, and Admiral Powell had charge of it when William Thruston died, which was a little while before Mrs. Powell died; the same year—1880. He came to me to settle up that trust and distribute the money among the Thruston heirs.

Q. Who got the bulk of the judge's estate?

A. Mrs. Powell, as I said, got these two pieces of property, which, I think, was the most valuable property the judge had.

Q. You mean the proceeds of it?

A. She got the property which was conveyed to her while she was unmarried. Admiral Powell and his wife united in a deed of the Third-street property to trustees for the benefit of them for their joint lives and for the life of the survivor, with a remainder over to the heirs-at law of Mrs. Powell, and that continued so when Admiral Powell died, and at that time the property stood in his possession. The other piece of property I do not know anything about personally, except what I have heard from him.

Q. Did you know what he got for it?

A. He sold it for about twenty thousand dollars, and he told me that he put that together with his own savings, which were considerable. He told me he never spent his income, but that he put that with his own savings and purchased property in the city of New York.

Mr. JOHNSON: At this point I would like to ask if this is offered for the purpose of tracing where the Admiral's property came from. Your honor will remember the other day when we attempted to prove the source of the Admiral's property it was ruled out.

The COURT: I think I excluded it because it was hearsay, though I do not think I ruled upon the subject then.

Mr. JOHNSON: I think you said that the question was immaterial.

WITNESS: I have stated it simply to show my connection with the Admiral. I knew Admiral Powell socially and when I was a youngster. Our family and the Admiral's family were always very intimate. Soon after I began to practice law my business relations commenced with him, and from that time on until he died I had constant business relations with him.

Q. And also social relations?

51 A. Yes, sir; I was quite intimate socially with him.

Q. State to the jury, in reference to your acquaintance with him, as to his mental capacity in 1882 to make a will, or 1883 or 1884.

A. Perfectly competent to make a will. I never saw a man more so.

Q. Did you ever observe any failure or symptoms of failure in the memory of Admiral Powell?

A. Never; there never was any such thing.

Q. What was his capacity as a business man?

A. Very good. I think he was a remarkable business man for a man of his occupation. He was a naval officer, and I think he was a remarkable business man.

Q. Was he careful, accurate, and exact?

A. A very careful man, and he took very great care of everything he had. He was an economical man, but at the same time lived like a gentleman. There was nothing about him that was penurious in any way.

Q. How many wills did you draw for him?

A. Three; one in 1881—the early part of 1881.

Q. After his wife's death?

A. Yes, sir; and the next one we have here, and also the last one.

Q. Will you state, as these gentlemen want to know very bad, about the Misses Weeks—how much did that first will give the Misses Weeks?

A. My recollection is that Admiral Powell in his first will gave the Misses Weeks fifteen hundred dollars. I remember this. I remember when he was giving me directions about his will, almost one of the last things, it strikes me, as I remember—I do not know whether it comes in that order, but my recollection is—he spoke of those girls. He said they were no particular relations of his, and that he was under no obligation to them particularly, as they had been receiving benefits, or something of that kind, through him and his wife; but he said that he would give them something, as they were poor, and he gave them fifteen hundred dollars.

Q. What was the date of that will; do you remember?

The WITNESS: That first will?

Q. Yes.

A. I cannot remember. I find, upon reference of memo-
52 randum of mine, that in January, 1881, I made a charge for the preparation of the will; but my recollection about the matter is that I was sent for by the Admiral before the 1st of January.

Q. 1881?

A. Yes, sir; some time in December, 1880, it must have been.

Q. Was it after the death of Mrs. Powell?

A. Very soon after. He was in great distress at the time, and he talked to me constantly about Mrs. Powell.

Q. What was the special object of the making of this will—was he sick?

A. He sent for me to make this will. In preparing the matter, as Judge Drake has said, at the time we had a conversation about a suit in New York of some person claiming some property that he had purchased, and he consulted me partly with the view to know whether he could provide in his will for the payment of that debt, if it should be adjudicated against him, out of this house—out of this

I-street property—and I advised him that he could, and prepared the will for that view. The property on I street was to be sold to provide for this matter in New York should it be adjudicated against him, and the proceeds were to be applied towards the payment of that debt, and next to legacies, both special legacies and the residuum legacies mentioned as coming out of the residuum of the estate. That was the first will. Before the second will was prepared the matter had been adjudicated in New York, and the will provided that the entire estate, real, personal, and mixed, should be taken by his executors and sold.

Q. That is the second will?

A. Yes, sir; and the fund distributed; but before the third will was made he had determined to take that I-street property to produce this endowment of a chair at Columbian University. I would say, if it is material, that he always regarded this property on I street as the property to be used as the residuum of his estate. He made memoranda for me showing what he was worth, what his estate was, how much he had set aside for legacies, and all that sort of thing, showing what he would do. I did not know anything about these matters until he told me.

53 Q. Will you tell me how Admiral Powell put you in possession of his desires concerning the disposition of his property?

Mr. JOHNSON: Which will are you speaking of?

Mr. TOTTEN: I am speaking of all of them.

A. He sent for me to call on him.

Q. Can you give the dates of his directions to you as to the terms of the different wills?

A. Yes, sir. Admiral Powell sent for me first. I think it was the latter part of December, 1880. I remember that it was before the 1st of January, because that family house had always been one of the gayest houses on the 1st of January in the city, and I was accustomed to go there. I remember this 1st of January particularly, because the house was closed, and I was in consultation with him then, and in the settlement of his affairs he sent for me, and I went there and found him in his office sitting up. He had been coming to my office a good deal during the year 1880. He was getting so that his vision was getting to be very defective.

Q. His eyesight?

A. Yes, sir; and I went and sat beside the table, and he had the large chair brought and dictated to me what he wanted, and I made a memoranda, and he had also prepared himself, in his own handwriting, the names of the beneficiaries under his will, describing the amount, and all these he had put into my hands, and I also made memoranda, and I went to see him again and again about it.

Q. At those interviews between you, when you were arranging about this will, did he have anybody present on either occasion or any occasion?

A. No, sir.

Q. Nobody but yourself?

A. No, sir.

Q. Nobody there making suggestions?

A. Never.

Q. Do you know what became of the first will?

A. My recollection about it is this: The will was encumbered, I think, with one or two codicils, and I was away. I was out of the city with my family, at Newport, and the will was sent to me from my office with some memoranda that Admiral Powell had made or given to the young gentleman in my office suggesting changes in different parts of the will, and particularly this change with regard to the
54 I-street property. That was sent to me and I underlined it and wrote all over this paper, changing it entirely, and sent it back here; and when the last will—this will of 1882—was prepared and completed, I cannot say I destroyed the other one, but I cannot find it. I think it must have been destroyed. It was a great mass of papers pasted and stuck together, and I saw what he wanted.

Q. How did Admiral Powell put you in possession of his wishes as to the disposition of his property by the second will—the will of August, 1882?

A. Well, I think it must have been through correspondence, and the young man in my office he sent it to me. I do not recollect anything much about that will. I think he told me before I went away from here that summer that he wished to make a change in regard to his real estate.

Q. But that was before the second will was made?

A. Yes, sir.

Q. In making the second will—the will of 1882—tell us how the Admiral put you in possession of his wishes as to the disposition of the property.

A. I do not know positively about that. I could not testify positively about it, except that the will was sent to me with a memoranda of these changes.

Q. What will was sent to you—the old one of 1881?

A. The old will of 1881 was sent to me with a memorandum of the changes that were desired to be made.

Q. At what time was it that the old will was sent to you?

A. Some time in the summer of 1882.

Q. Where were you then?

A. Newport, Rhode Island.

Q. Can you give us a history of the codicils that you find there—three of them?

A. I can tell if you will let me see the codicils; it will bring my recollection back to what was done about them. (The will was here shown the witness.) The first change that he makes here in this first codicil is with reference to a legacy made to Mrs. Charles B. Thruston. The recital is that he in his original will——

Mr. JOHNSON (interrupting): Never mind, we can see what is in the original will.

55 The WITNESS: But I am going to tell you now how it came about. He sent for me and told me he thought he had not

made such provision as he should have made for Mrs. Charles B. Thruston, and changed it accordingly; that was all.

Q. Who was she?

A. Mrs. Charles B. Thruston was a niece of the Admiral's.

Q. One of the Cumberland Thrustons?

A. Yes, sir.

The COURT: A niece of Mrs. Powell's?

A. Yes, sir; of both, as the Admiral and his wife were cousins. She was Mrs. Powell's niece and a half niece of the Admiral's.

Q. How about the second one? Did the Admiral send for you about that codicil?

A. Yes, sir; he sent for me to put that codicil in. We had a conversation about that.

Q. Anybody present?

A. No one.

Q. He gave you the instructions himself, did he?

A. Yes, sir. The next change here I see is in respect to Mrs. Bessie Thruston. He always spoke very affectionately about Mrs. Bessie Thruston, who seemed to be a favorite of his.

Q. Was she a Cumberland Thruston?

A. Yes, sir.

Q. Was she a mother of the other lady?

A. No, sir; she was a widow of George, who was a nephew of Mrs. Powell and a half nephew of Admiral Powell's. Then he changed his position with regard to the residue of the estate. When he changed from time to time he seemed to regard the residue as a fund that he was to dispose of sometimes one way and sometimes another. He seemed always to desire to benefit some person by this residue. There was Mrs. Rader and adopted daughter, and he was very fond of Gates Thruston and told me if Gates was not as rich as he was he would give Gates more. The next codicil, which was made in April, 1884, some changes were made in the will, but I do not think any of them were very material changes. The second codicil I remember very particularly about. I received a letter and note written by Mrs. Stewart, dictated by Admiral Powell——

Mr. JOHNSON: How do you know that?

56 A. It is signed by L. M. Powell, informing me that Alfred Buckner Thruston had been wounded in Mexico, where he lived—or at least was staying at that time—and was supposed to be very seriously injured. It was very important that something should be done at once for the reason that the provision made for him in the will——

Q. (Interrupting.) Did he tell you about this himself?

A. He sent for me afterwards—the first information I received was his note—and I went to him.

Q. Did he tell you about that?

A. He told me about this young Thruston, and the Admiral remembered that he had, in providing for him in the will, he had fixed the legacy in such a way that the children of Alfred Thruston could not get it if he should die of the wound. I do not know where Buckner lived, but at the time the original will was made

Buckner Thruston was employed on some railroad in the Southwest, and when the codicil came to be made he was in Mexico and had received this wound, from which it was feared he would die; and, as I say, I received this note—the note is there (referring to papers on table)—and I went to the Admiral and the Admiral told me that he wanted to make an arrangement so that in case this man should die this legacy should go to his children.

Q. And that resulted in the third codicil?

A. Yes, sir; this codicil of April. In this codicil he changes the disposition of the residue. Now, he makes some little change here in another respect, but I cannot say exactly how or why it was done, but it was dictated to me by the Admiral.

Q. Can you tell us about the last will—the one we have before us here; how did he put you in possession of his desires at that time?

A. The Admiral told me when he made this will that he had done making wills; that that was the last of it.

Mr. JOHNSON: The will of 1882?

A. Yes; that he would not make any more wills. When I came home—I had spent the summer in the neighborhood and was in and out—I was sent for by the Admiral, but I do not recollect when I saw Admiral Powell; but it was when I came back to the city, and it must have been in September—the latter part of September.

Q. After you came to the city in 1882?

57 A. Yes, sir; from my country residence. I was sent for by Admiral Powell, and I found that he had determined to create this scholarship. He never said anything to me about it and never consulted me about it. After we had had two or three conversations upon it, he told me that he had seen General Drum and Dr. Welling, and, I think, some one else—some naval gentleman, but I have forgotten who—and he told me what he had determined to do. He said he wanted to do something that should indicate to the world his pride in his profession, and that he thought the best way to do so was to create and endow this scholarship in this college. He then told me what he wanted. He said he had been for a long time on the board of examiners, or something that has to do with the examination of young men for admission to the navy, and he had observed how defective they were in some of the branches of an ordinary education—something that young men ought to know; and he thought it remarkable that young men should know so little about these particular branches; and he said he had determined to create this scholarship in Columbian University, where young men could be educated principally in these branches. He mentioned arithmetic, matters relating to mathematics, which he said their general education was principally defective in, and he gave me his views about the matter. He told me that he wanted me to see Dr. Welling. I went to see Dr. Welling.

Mr. JOHNSON: Never mind what Dr. Welling said.

A. I went to see Dr. Welling, but didn't see him; I wanted to show why it was so long after he first spoke to me before this will was prepared, as conversations were being had about the matter all the time. I saw Dr. Welling and had a brief conversation with

him one morning in my office. I found that he and the Admiral did not quite agree about the details.

Mr. JOHNSON: Mr. Webb, I would not say what Dr. Welling said.

A. I am not going to say that. Afterwards, along in a day or two, I again called on Dr. Welling, but found that he was absent from the city; that he had gone to Hartford. He wrote to me a letter—quite a long letter—giving me his views of this trust. I went with it to Admiral Powell, and sat down with him and discussed the matter.

58 Q. Did the Admiral tell you what his views were with respect to this?

A. Yes. Mr. Welling, in his scope of the trust, comprehended that all young men who entered the college to take advantage of this scholarship should go through the regular course—go through the four years that young men have to take in the college; that this education should be spread over that time. The Admiral insisted that that could not be done, and that young men usually applied for situations in the navy without a preparation of anything like four years; that they could not have more than a year outside, and if the entire matter could not be arranged so that these men could have the education that they ought to have in these branches in a year that it would have to be an end of the matter. He was very positive about the matter. I won't tell what Dr. Welling said, but the matter was arranged, and I sketched out that trust that I read to you entirely from the Admiral's dictation, and put it in my own language. That is the trust that the Admiral determined upon, and he was very positive that he should arrange that thing to suit himself; and the will was prepared accordingly.

Q. In the will of 1882 the Misses Weeks, the two girls, got five hundred dollars between them?

A. Yes, sir; they got a thousand, but in the codicil he cut it down to five hundred dollars.

Q. In the last will they didn't get anything at all?

A. No, sir.

Q. How did that happen?

A. He changed the last will. He took the property on I street that he had always regarded as the residue of the estate and applied it to this endowment, and he dropped out the legacies.

Mr. MCKAY: Did the Admiral give you his reasons; what did he say to you was the reason why he left the Weeks girls out?

A. He gave me a reason for dropping several legacies—not the Misses Weeks particularly—when I sat down by his bedside. One of the remarkable things about Admiral Powell was that he did not require to have any paper about him or any suggestions made to him, but he remembered particularly what he had done with his estate better than I did; I would have to turn to the

59 paper to find out, but he remembered everything particularly, and when he took this house out of the estate and made the scholarship he told me he would have to leave out some of these legacies, and as he came to them he would say, "Leave that out."

There was the Bradley legacy—the legacy to Powell Bradley—and as he reached them he would say, "Strike that out;" the Weeks girls, "Strike that out;" "Leave out the legacy to Judge Drake;" and he also changed certain legacies. He changed the legacy to Mrs. Rader, as I recollect. I will tell you what he did or why he did that, if you want to know.

Q. Tell us.

A. After his first will he gave her a piece of property. During the time between the second and third will it was sold—that is, the house that he bought for her—and the Admiral said he would give her what he intended to in such shape that her husband could not get to it, and he put it in trust in the hands of her brother. He created several trusts with respect to legacies.

Q. In his last will?

A. Yes, sir; and he would tell me the reasons why he created those trusts, which I could tell you, if you would like to know.

Q. Well, go on.

A. With respect to Mrs. Brand, he spoke very kindly of Mrs. Brand and said she was a very nice old lady; that she was poor, and he would like to make provision for her, but he did not like to have her children get anything that he might leave to her; that he wanted to give it to her so that her children would not be able to get it and squander it, and he asked me if there was any way by which he could provide for the old lady, and I suggested his creating the trust. He asked me if I would take the trust. I said that I could not, and hesitated about it, as I did not like to do it; but he pressed me, and I took the trust. He directed me to give it to her for her life, with the remainder over to the Garfield Hospital. In regard to another one, he said that her husband was a man who never kept any property, and he intended to put it, if possible, out of his way, and he went on and stated his reasons with respect to other legacies.

Q. These were suggestions of his own mind?

60 A. Always. I never suggested a thing and never heard any suggestion.

Q. Was anybody present during his instructions or communications to you of his desires, especially with respect to this last will, except yourself?

A. Never. He always had the doors closed.

Q. Mrs. Stewart was not about there?

A. I never saw Mrs. Stewart about there when I was talking business to the Admiral. Mrs. Stewart sometimes sat in the room when we were together and talked pleasantly together. He was very fond of Mrs. Stewart and always spoke in the kindest terms about her.

Q. She was never there when you were discussing the subject of the will?

A. No, sir; and one of the things he spoke of in connection with her was that she was able to read to him in one or two languages—Spanish and French—and he liked to hear her read such books as

she read to him in those languages, and he came to regard her as a particular friend.

Q. Did you ever have any conversation with the Admiral or did you ever say anything to him touching the Weeks girls in reference to their repeated calls upon him for money?

A. Never. He spoke very kindly about them and said that they were poor and that he would like to make some provision for them. He said that they had no particular claims upon him, and said that they had received from time to time something from himself and wife.

Mr. JOHNSON: What is that language?

A. He said that they were very nice girls; that they were poor, but he was under no obligation to make provision for them, and that they had frequently received from himself and wife presents and one thing and another.

Q. Did he say that he thought that was sufficient, or otherwise?

A. He did not say that exactly.

Q. But he left them out?

A. Yes, sir; finally.

Q. Did you take any notes?

A. I always took memoranda, which I finally put in the shape of a will or codicil, as the case may be. I would go to see him
61 generally, and have two or three conversations about the matter before the will or codicil would be complete.

Q. Was he capable of making a valid contract, deed, or will, in your judgment?

A. I never saw him when he was not. I didn't see Admiral Powell within a few days of his death.

Q. How many days?

A. Well, probably a little after the 1st of January I went there—probably the sixth or eighth or somewhere along there—for a few minutes. He had then begun to be so feeble that it was difficult to talk with him. I had to lean over to get what he said. Before that I never had done anything of the kind. He always talked before that without any apparent difficulty at all; and some time after that I heard that General Thruston was here.

Q. Were you accustomed to see Mrs. Stewart about the house while you were there?

A. Yes, sir.

Q. What position did she seem to occupy in the house?

A. She was the mistress of the house.

Q. How long have you known her?

A. I made her acquaintance—I do not recollect, but I think I made her acquaintance in the early part of 1881, I think. I cannot state exactly the date. I can only remember that it was about that time.

Q. Is she a lady of accomplishments?

A. Yes, sir; she seemed to me to be a lady of intelligence and accomplishment.

Q. You were about the house. Did you see any indications as to her being under the influence of any kind of stimulants?

A. Never, sir.

Q. Did you ever hear of a difficulty been [between] Miss Condon and Mrs. Stewart?

A. Only from what Mrs. Stewart told me.

Q. Did you ever see Mrs. Stewart exercising or attempting to exercise any influence over Admiral Powell as to his making a will or in any other business?

A. Never; never anything of the kind, that I have any knowledge of.

Q. Did you ever hear Admiral Powell mention the name of Mrs. Colmesnil?

62 A. Never. I remember a good many years ago of hearing of the name of Colmesnil here in Washington, but I do not recollect whether I knew any one of that name or not. I never heard of Admiral Powell speaking of her.

Q. Did you ever hear her name mentioned in the house?

A. Never.

Cross-examination by Mr. JOHNSON:

Question. You said you were sent for to draw his will?

Answer. Sent for to consult about it.

Q. Who sent for you?

A. Admiral Powell.

Q. How did he send?

A. He sent a servant for me, I believe; it was so long ago that I do not recollect.

Q. Verbal message?

A. Yes, sir.

Q. You were in the city at the time you were summoned to prepare the second will?

A. I was out of the city when the will was completed.

Q. But I mean when you were called upon to consult with him about it?

A. I cannot tell you about that.

Q. Do you remember your being sent for?

A. I cannot tell you at all about that. I saw Admiral Powell about every ten days or fortnight, and we talked about this matter. He may have talked with me about these matters then and then put them in writing and sent them to Newport.

Q. Do you remember any circumstances about it?

A. No, sir.

Q. You don't remember the circumstances? Now, do you know whether you were sent for or whether you dropped in accidentally and were consulted with reference to the second will?

A. I do not know whether I was absolutely sent for or it was talked over in our usual way on one of my calls.

Q. He mentioned it to you, then, on one of your casual visits?

63 A. I made it a point to go to see the Admiral every week or ten days. Every fortnight I was there without fail.

Q. The third will—that is, the will in controversy—you were sent a note asking you to call on the Admiral?

A. Yes, sir.

Q. Did the note state simply to call or did it state the purpose?

A. It is there (referring to papers on table) among my papers, and I cannot tell you now.

Q. Can you conveniently produce it?

A. I think so.

(The witness here inspects certain memoranda and letters.)

The WITNESS: I do not believe I have got it; I cannot recollect; it is just possible that I went there soon after I got to town. I have here in this bundle certain notes and letters that I received from him about this time. Here is a note of October the 12th, 1884, written by Mrs. Stewart in the name of L. M. Powell, telling me not to wait for Professor Welling to return, but to come up and see the Admiral himself about the matter.

Mr. JOHNSON: Will you be kind enough to let me look at that, please?

WITNESS: Here is a memorandum, also, in Mr. Cogan's handwriting. Here is also a letter saying that Dr. Welling had been suddenly called to Hartford; that was the note he sent me to tell me he had gone to Hartford.

Mr. JOHNSON: I will read this one of October 2d. If you will oblige me by giving me your attention for a moment, I would like to read these letters to you and ask you one or two questions in connection with them. There seems to be one sheet torn in half, and on the second there appear these words and figures——

Mr. TOTTEN: How do you know that the sheet was torn in half?

Mr. JOHNSON: Well, I will take that back.

Mr. WEBB: It is possible that I may have called just as soon as I came to the city upon Admiral Powell or received some information to call in some way that was not in the shape of a note.

Mr. JOHNSON: I will read:

"1707 I STREET N. W., *October 2d*, 1884.

64 MY DEAR MR. WEBB: I have been very sick again and we had better not delay the work in hand. There is one error which I think should be corrected.

Yours truly,

L. M. POWELL,
Per H. C. STEWART."

Q. That letter was received by you, was it? You understand that letter to refer to the matter of Admiral Powell's will?

A. I cannot tell you; I suppose it did; that was the only thing he was writing to me about then.

Q. This other paper that you handed me in connection with it, did it come at the same time?

A. It appears to be addressed by Mr. Cogan; I think they came together; I found them in the same envelope; I cannot tell you now.

Mr. JOHNSON: The other letter is:

"MY DEAR MR. WEBB: The Admiral is worrying over this matter. Can't you come and make all safe at once? He knows exactly what he wishes, and you understand him so perfectly that you need not wait upon any one else. He is again very sick and feeble, and you will aid me very much by getting this matter off his mind as quickly as possible. The very worry of waiting, my good friend, is most trying to one so aged. He has not your many occupations to fill his mind and time, and therefore this matter preys upon him.

I beg that you will give it your immediate attention, as his trust and confidence in you is so unbounded he will not trust it to any one else, even as a secret, till you have done your part.

Very truly yours, H. C. STEWART."

Mr. JOHNSON: I would like to have these two papers put in evidence, your honor.

Mr. WEBB: You can have my whole correspondence if you want it. There is nothing that I care to conceal about anything. I am sure that none of us have anything at all to conceal.

Mr. JOHNSON: I trust you understand that anything I say
65 or do is not meant as a reflection upon you. You were asked if you ever saw Mrs. Stewart exercising any influence over Admiral Powell? Did you ever see any one do anything of that kind?

A. No, sir; I never did.

Q. You were asked if you ever saw Mrs. Stewart in an intoxicated condition or under the influence of liquor. Is it not quite possible that she might have been so without your knowing it?

A. Yes, sir; I did not see Mrs. Stewart all the time I was there. Frequently I did in the evening, and sometimes in the day-time. From what I know of her, if anybody had told me that she was under that influence I would have thought they told me something that was untrue.

The caveatees, to further maintain the issue joined on their part, offered HARRIET C. STEWART, a witness produced on behalf of the propounders of the will, —, being first duly sworn according to law, was examined as follows:

Direct examination by Mr. TOTTEN:

Question. What is your full name?

Answer. Harriet Chipman Stewart?

Q. Are you a kinswoman of Admiral Powell and his wife?

A. Yes, sir; my father was his first cousin.

Q. Were you acquainted with Admiral Powell?

A. Very well, sir.

Q. For how long a period of time?

A. Since I came here, I think, in 1870—the winter of 1870 and 1871.

Q. Were you acquainted with Mrs. Powell?

A. Yes, sir.

Q. For how long a time?

A. I knew her about six weeks after I came here that winter.

Q. What relation did you bear to Admiral Powell's household during the last two years of his life?

A. I was the mistress of his house.

Q. What were your duties—what did you do?

A. I read to him, nursed him when he was sick, and did anything that I could to alleviate him or oblige him.

66 Q. Were you otherwise engaged during the day?

A. Yes, sir. I was engaged in my office, in the scientific library of the Patent Office.

Q. How long have you been engaged there?

A. I have been engaged there, I think, ever since General Grant's second administration. I do not recollect the year.

Q. Are you still employed there?

A. Yes, sir.

Q. What are your duties there?

A. I have been indexing the library, assorting the books, indexing them as they were received and entering every one, and in translating. Years ago I translated one-third of the French patents that were used; that was about three years ago.

Q. Does it require a person of more than ordinary education to fill that position?

A. I think anybody could fill the position. I have no such pride to think that I could fill a position that others cannot.

Q. How many languages do you understand?

A. Four, partially.

Q. Name them.

A. French and Spanish, very well, and Italian and Portuguese—a little more of Italian than Portuguese.

Q. When did you make your domicile in the Admiral's house first?

WITNESS: You mean move there entirely, sir?

Q. Yes.

A. I think it was in December, after Mrs. Powell's death, when I moved there; but I am not certain when I moved my trunks there; but I think it was about two months afterwards, though I will not be certain.

Q. You maintained a room on your own account for some time elsewhere?

A. Yes, sir.

Q. How came you to move from your room and go and take up your abode in the Admiral's house?

A. Because he requested me to do so.

Q. Can you state what he said?

A. He had asked me repeatedly to come and live there.

Q. He wanted you there?

A. Yes, sir; and during the whole time Admiral Powell
67 was able to go out, as no one as yet has stated, for a year or more after his wife's death. He went over to the Monument one day and walked with Mrs. Rader and General Hunter. He went out with his clerk, Mr. Fracker, on the streets and took walks.

Q. Can you tell what time he became unable to go out?

A. I could not tell you, sir; but he went down to his dentist in the carriage in the year 1882. I recollect that perfectly.

Q. Was it the early or the latter part of the year?

A. I think it was towards the fall of the year, but I could not be certain, General Totten, of those things.

Q. What were your office hours during the last two years of Admiral Powell's life?

A. I left the house about half after eight in the morning and generally came back about half past four.

Q. Who attended to the marketing of the house while you were with the Admiral?

A. George Perrego has attended to the marketing ever since I have known Admiral Powell. During Mrs. Powell's life I used to visit them all along, and she has come to my office at two o'clock and staid there until I was through and took me home.

Q. What were your relations with her?

A. Perfectly amiable and kind.

Q. Did Mrs. Powell charge you with any trust just about the time she died?

A. She asked me to take care of my cousin, and I told her I would do whatever Cousin Levin would permit me to do.

Q. What were your duties, so far as the Admiral personally was concerned, during the latter part of his life—say for six months before he died?

A. Well, I did pretty much the entire nursing of him until Miss Condon came into the house, two months before his death—that is, on the fourteenth of November. I nursed him all day and very frequently all night week after week.

Q. Did you ever say anything to the Admiral in relation to the disposition which he would make—did make—of his property?

A. Never; so help me Heaven.

68 Q. Did you ever exercise or try to exercise any influence over his mind as to his disposition of any of his property?

A. No, sir; and I could not, even if I had tried.

Q. You never did?

A. No, sir.

Q. Did you ever speak to him upon the subject of any one of these wills?

A. Never.

Q. Never mentioned it?

A. Never.

Q. When did you first find out what the contents of either of these wills were?

A. General Thruston told me first of it.

Q. Was that after the Admiral's death?

A. Yes, sir; the day before his burial.

Q. Did you know what was in this will that we are having this controversy about before General Thruston told you?

A. No, sir; I never read one of the Admiral's wills.

Q. Were you ever present when a will was executed there?

A. Never.

Q. Were you ever present at any of the interviews between the Admiral and Mr. Webb in relation to any business transactions?

A. Never.

Q. What was his custom when people came there to discuss business with them or to transact business with him?

A. All the doors were locked in every direction. I never saw any one so particular.

Q. Did you go with the Admiral to Piedmont?

A. Yes, sir.

Q. How long did you stay there?

A. Twelve days.

Q. That was very soon after the death of Mrs. Powell, was it not?

A. I think it was the July following.

Q. Who was in the house during the last two years of Admiral Powell's life permanently? I want you to name the people.

A. No one save myself permanently.

Q. Was not George Perego there?

69 A. I was going to name the help of the house; there was George Perrego and the cook, Virginia.

Q. And the Admiral.

A. Of course he was there.

Q. Was General Thruston a visitor at the house frequently?

A. General Thruston has been twice in the house since I have been with the Admiral, and as he stated to you this morning.

Q. It has been stated by one or two witnesses or persons that they were excluded from the house—the Misses Weeks. I wish you would state what there is about that. If they were excluded, when, by whom, and how?

A. I couldn't tell you, as I went to my office at half after eight and didn't return until half after four, who was excluded while I was away, but I know that a very short time before Admiral Powell's death Miss Weeks came two Sunday mornings from church and was admitted to see him, and I left the room each time, since he appeared to have something to say to Miss Weeks, and when she came out she told me that George Perrego had told Cousin Levin that Miss Fannie Weeks said that she had been to the house forty-three times without seeing him. She told me that, and when the Admiral spoke of it to me I said probably that she meant three or four times; that George misunderstood her, but George positively said that he didn't misunderstand her.

Q. Did you ever issue any orders to keep the Misses Weeks out or prevent them from seeing the Admiral?

A. No, sir. When the physician told me that Admiral Powell should be kept quiet I told him not to give the order to me, but to give these orders to the servants, as I was out a good deal.

Q. There was something said yesterday—said on the witness stand—about boots or shoes or something; some knitted boots or shoes for the Admiral's gouty foot.

A. Admiral Powell sent to Baltimore—had a note written to Baltimore—to have a pair of cork-sole cloth shoes made to fit him, but when they arrived they did not suit; they were too small for his

foot, and Miss Fanny Weeks knitted him a beautiful pair of boots and sent them to him for a Christmas present, and he wore
70 them in the house. They were very handsome and he admired them exceedingly.

Q. Did you ever tell him that you paid two dollars and a half to Misses Weeks for the boots?

A. He may have paid two dollars and a half for those that came from Baltimore. I did not pay her anything. She absolutely refused to accept anything and said that they were a gift.

Q. Did you tell the Admiral that you had paid her?

A. No, sir; if I had *of* paid her, of course it would have appeared in his accounts.

Q. Miss Alice Condon came to the house as a nurse on the 14th of November preceding the Admiral's death. Did you have any controversy with her? And if you did, I wish you would explain to the jury how it arose and the nature of it.

A. Well, General Totten, I dislike to speak unkindly of any one; I did not come here for that.

Mr. WEBB: Tell us something about it.

Mr. TOTTEN: You had a difficulty, did you?

A. Admiral Powell never fancied Miss Condon from the first, as she didn't seem to recognize that I was a cousin of the Admiral's and mistress of the house; she didn't seem to recognize it. He told me that he spoke to her about it, and placed me upon my proper footing. Of course that created some unkind feelings. I had no unkind feelings toward Miss Condon, not a particle, and have not now.

Q. It was said, Mrs. Stewart, that on one occasion when Dr. Addison wished to administer the communion service to the Admiral during his last days that he was unwilling to take the communion, but that you overruled him and forced him to do it. What have you to say about that?

WITNESS: Why should he have sent for Dr. Addison?

Mr. TOTTEN: Don't ask me that question; answer mine.

A. I will. When Dr. Addison came into the room I was preparing for the service, and when he came in I said, "Admiral Powell, everything is ready;" but he said, "No, I am not ready;" and at that moment Mr. Cogan, his secretary, brought this note for a hundred dollars that he wished to give to Dr. Addison and Dr. Forrest.

Q. The check for a hundred dollars, you mean?

71 A. Yes, sir; and when he brought it in the Admiral said, "Business first."

Q. Was there any objection on his part to taking the communion on that day?

A. No, sir.

Q. Did you enter into a discussion with him about it?

A. Not at all, sir.

Q. Mrs. Stewart, it has been stated by several witnesses here that you were in the habit of drinking too much. I wish you would tell the jury about that.

A. I was at work all day and often nursing all night. I sometimes probably did what was stated.

Mr. TOTTEN: That is all, gentlemen.

Cross-examination by Mr. McKAY:

Question. Do you remember having a conversation with Mr. Gates Thruston at the house here before the Admiral died in which he asked you why the Weeks girls were left something in the first will and nothing in the last will?

Answer. No, sir; he asked me no such question.

Q. Do you remember of saying in response to that question that it was because they had tried to prejudice the Admiral against you, and on that account you had them left out, and they were left out?

A. That is a garbled account of what took place.

Q. What is a correct statement, then?

A. General Thruston came in and told me—Iwas not present and knew nothing about the will and had never read one of them—that he was very sorry that the Weeks girls had been left out. I said, "General, I am very sorry too, because I do not think it would have injured us." I did not know until General Thruston told me at that time that Admiral Powell had given me a cent. He gave me the first intimation of the whole will. The second will I never heard at all of, or the first.

Q. Your recollection is that you stated to General Thruston that if it had been done you do not think it would have injured the rest of you?

72 A. I said that if the Misses Weeks had been left something that I didn't think it would have injured the rest of us. I would have been very glad if the Admiral had left them anything.

Q. Do you remember, the day of the Admiral's death, of having had a talk with Miss Weeks, and saying that if George had not drank so much that you would have had him better provided for?

A. I may have said something, but I know that Miss Weeks came up to my room there and she said to me, "Of course Cousin Levin provided for you as everybody expected that he would." I told her that I had no right to expect anything from him, and that I had no right to look upon it in any such way.

Q. Do you remember of your saying to her that if George had not drank so much that you would have had him better provided for?

A. I did not say that; but I said that the Admiral might have provided for him better. I did not say that I would have provided for him, because I had nothing to do with it.

Q. Do you remember what you did say on that subject?

A. No, sir; I know that I didn't say that I would have had him provided for better, because it was utterly impossible for me to say that I would have had him provided for better.

Q. Do you remember of saying on that occasion that a fight would begin over what the Admiral left, or something of that sort?

A. Never.

Q. Do you remember on that occasion of saying to Miss Weeks that the Admiral had made a will about two months after his wife's death, and he had not changed it except, as the income increased, he would have a codicil attached; outside of that, that was the only change that was made?

A. I do not remember that. I do not remember anything about that.

Q. Do you remember of saying to her on that occasion that you had no idea of what was in the will?

A. If it was talked of, I may have talked to her in that way.

Q. Was it true that you didn't know what was in the will?

A. Perfectly true.

Q. You knew nothing of the provisions at all?

73 A. Nothing at all.

Q. And you didn't know until Mr. Thruston told you so, after the Admiral was buried—after the funeral?

A. I do not recollect whether it was after the funeral or whether it was the day before.

Q. Now, I will ask you whether during the time that you were there Mr. Gates Thruston was there more than one time, except on the occasion of the death of the Admiral?

A. That is all. He was there only once during the three or four years that I was there.

Q. Do you remember of having a conversation with Miss Condon while she was there as nurse in which you said to her that the Admiral would have given you more if you had wanted it?

A. No, sir.

Q. That you got all you wanted?

A. No, sir; never.

Q. That he wanted to give you forty thousand dollars, but you would not let him do it?

A. Never.

Q. Do you remember of saying that you were not there for money, but were there and had taken possession of the Admiral's household? You don't remember any such conversation or any part of it?

A. Yes; the first part of it. I said I was not there for money and I would not stay for money.

The caveators recalled MARY E. WEEKS in rebuttal, and — was asked the following question:

(By Mr. MCKAY:)

Question. I will ask you to state to the jury whether or not on the day after Admiral Powell's death you had a conversation with Mrs. Stewart in regard to the provision in the will as to whether George, the servant, was fully provided for. And, if so, what did Mrs. Stewart say in regard to that matter?

This question was objected to, but, after argument by counsel, the

court overruled the objection and admitted the answer; which was as follows, to wit:

Answer. She said to me, "I know nothing of the contents of the will; but had George remained sober I would have had him
74 well provided for. The Admiral called him up three months previously and said, 'I will give thirty dollars a month and one hundred dollars additional.'" She said, "If George had remained sober she could have had him better provided for." Those are her exact words.

The caveatees further offered the testimony of William B. Webb, tending to show that in the first will Mrs. Harriet C. Stewart took a legacy of ten thousand dollars. Thereupon the caveatees rested their case. Said will is hereto marked "A" and made a part hereof.

The testimony being concluded upon both sides, as above stated, the caveators thereupon, and before the jury retired to consider of their verdict, prayed the court to instruct the jury as follows:

"It is not necessary that the mind of the testator should be shown to be so weak as to render him incapable of attending to ordinary business in order to prove that he was unduly influenced in the execution of the will." Granted.

"In determining whether the will was procured by undue influence it is material to enquire not only whether the will expresses the intention of the testator at the time of its execution, but also as to how that intention was produced." Granted.

"In determining whether or not the will in controversy was made and executed under undue influence it is proper for the jury to consider the relationship to and intimacy with the testator and the necessitous circumstances of the parties named as beneficiaries in said will and of the next of kin and heirs-at-law of the testator not named as beneficiaries in said will." Granted.

"The contents of the alleged will itself and the manner in which it was written and executed, together with the nature and extent of the estate of the testator, his family and connections, their condition and relative situation to them, the terms upon which he stood with them, and the claims of particular individuals, the condition and relative situation of the legatees named, the old age, bodily infirmity, and weakness of the testator, and the circumstances under which the alleged will was made, are all proper for the consideration of the jury upon the question of incapacity and undue influence."

75 "And if the jury believe from all the facts and circumstances shown in evidence that said alleged will is the result of an unsound mind or of the undue influence or importunities of the person or persons surrounding the alleged testator at the time of the execution thereof, or both, they should so say in their verdict." Granted.

"Influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ which would give dominion over

the will of the testator to such an extent as to destroy free agency or constrain him against his will to do what he is unable to refuse, is such influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection or obtained at one time or another." Granted.

"If the jury should believe from the evidence that the alleged will or any part of it was obtained by undue influence, they should find in their verdict that said paper was so obtained." Granted.

All of which (one to five) were granted by the court.

And thereupon counsel for caveators further prayed the court to instruct the jury as follows:

"In order to establish undue influence, it is not necessary to prove the influence to have been exercised at the time of the execution of the will or with reference to that act; but if the jury believe from the evidence that the undue influence existed prior to and near the time of the execution of the will, they may infer that the will was executed under the continuance of such influence."

But the court refused to grant the said instructions; to which judgment and refusal in this behalf the caveators, by their counsel, duly excepted, and the presiding justice noted the said exception upon his minutes; and it is prayed that the same may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

76 *Bill of Exceptions.*

V.

Be it further remembered that at the trial of this cause and after all the evidence upon both sides, as set out in the fourth bill of exceptions herein, which evidence is made part of this bill of exceptions, and before the jury retired to consider of their verdict, the caveators, by their counsel, prayed the court to instruct the jury as follows:

"If the jury believe from the evidence that the paper-writing purporting to be the last will and testament of Levin M. Powell is arbitrary and unjust and largely in favor of Harriet C. Stewart, and that said Stewart was the nurse for and held confidential relations with said Powell at the time of the alleged execution of the said paper and for a long time prior thereto, and that said Stewart, as such nurse and confidant, might have improperly and unlawfully influenced the testator's mind, then slight evidence of such unlawful influence is sufficient to invalidate said will unless rebutted by other proof."

But the court refused to grant said instruction; to which judgment and refusal in this behalf the caveators, by their counsel, then and there excepted, and the presiding justice noted the said exception upon his minutes, and it is prayed that the same may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

*Bill of Exceptions.*

VI.

Be it remembered that at the trial of this cause and after all the testimony set out in the fourth bill of exceptions herein had been given in evidence, which testimony is referred to and made part of this bill of exceptions, and before the jury retired to consider of their verdict, the caveators, by their counsel, prayed the court to instruct the jury as follows:

"Evidence that the said legatee, Harriet C. Stewart, im-
77 properly influenced the testator as to other important matters and things than the execution of said will is proper to be considered by the jury as tending to show that she could and did improperly influence him to make the bequests in her favor or to exclude others of his next of kin and heirs-at-law from a participation in his estate."

But the court refused to grant the said instruction; to which judgment and refusal in this behalf the caveators, by their counsel, then and there excepted, and the presiding justice noted the said exception upon his minutes, and it is prayed that the same may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

*Bill of Exceptions.*

VII.

Be it further remembered that at the trial of this cause, and after all the testimony set out in the fourth bill of exceptions herein had been given in evidence, and before the jury retired to consider of their verdict, which testimony is referred to and made part of this bill of exceptions, the caveators, by their counsel, prayed the court to instruct the jury as follows:

"If the jury believe from the evidence that the said Harriet C. Stewart is a beneficiary under said will, and that she was instrumental in procuring the preparation and execution of the same; and if they further believe from the evidence that at and before the execution of the said will the said Stewart prevented certain of the next of kin or heirs-at-law of said testator, who are injured by said will, from having access to him; that shortly before that time she willfully misrepresented any of such next of kin or heirs-at-law to the said testator, they may infer from such circumstances that Harriet C. Stewart did unduly influence said testator in the execution of said will."

But the court refused to grant the said instruction; to which judgment and refusal in this behalf the caveators, by their
78 counsel, then and there excepted, and the presiding justice noted the said exception upon his minutes, and it is prayed

that the same may be saved to them, signed and sealed, which is accordingly done this the 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

*Bill of Exceptions.*

VIII.

Be it further remembered that at the trial of this cause, and after all the testimony set out in the fourth bill of exceptions herein had been given in evidence, which testimony is referred to and made part of this bill of exceptions, and before the jury had retired to consider of their verdict, the caveators, by their counsel, prayed the court to instruct the jury as follows:

"If the jury believe from the evidence that Mrs. Harriet C. Stewart, for the purpose of influencing said Levin M. Powell in making his will, raised prejudices in the mind of said Powell against those who would otherwise have been the natural objects of his bounty, and by contrivance kept him from intercourse with such persons, to the end that those prejudices or impressions which she knew he had thus formed to the disadvantage of such persons (if the jury so believe) might be removed, then the jury are entitled to consider these facts in connection with other facts in the case in deciding the issue relative to undue influence."

But the court refused to grant the said instruction as prayed, but granted the same with the modification in the following words, to wit: "But such facts would not of themselves amount to such proof as the law requires of undue influence sufficient to invalidate the will." To which modification and refusal the caveators, by their counsel, then and there excepted, and the presiding justice noted the said exception upon his minutes, and it is prayed that the same may be saved to them, signed and sealed, which is accordingly done this the 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

79 *Bill of Exceptions.*

IX.

Be it further remembered that at the trial of this cause and after all the testimony set out in the fourth bill of exceptions herein had been given in evidence, which testimony is referred to and made part of this bill of exceptions, and before the jury had retired to consider of their verdict, the caveatees prayed the court to instruct the jury as follows:

"That the burden of proof is on the caveators in this case to satisfy the jury that the will offered in evidence was induced by undue influence, and that unless the jury shall be so satisfied their verdict must be for the defendants."

To which instruction the caveators objected; but the court overruled said objection and granted the said instruction; to which judgment in this behalf the counsel for the caveators then and there

excepted, and the presiding justice noted the said exception upon his minutes; and it is prayed that the same may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

*Bill of Exceptions.*

X.

And be it further remembered that at the trial of this cause and after all the testimony set out in the fourth bill of exceptions herein had been given in evidence, which testimony is referred to and made part hereof, and before the jury retired to consider of their verdict, the caveatees prayed the court to instruct the jury as follows:

"If the jury shall believe the evidence of Mrs. Harriet C. Stewart upon the subject of undue influence given by her in this case, then the verdict must be in favor of the defendants and in support of the will."

80 To which instruction the caveators, by their counsel, objected; but the court overruled the said objection and granted the instruction; to which judgment in this behalf the caveators, by their counsel, then and there excepted, and the presiding justice noted the said exception upon his minutes; and it — prayed that the same may be saved to them, signed and sealed, which is accordingly done this 9th day of May, 1885, now for then.

W. S. COX, *J.* [SEAL.]

In response to said issues the jury returned the following verdict:

First. Whether the said paper-writing purporting to be the last will and testament of the said Levin M. Powell, bearing date on the 27th of October, 1884, was executed and attested in due form of law?

Answer. Yes.

Second. Whether the contents of said paper-writing were read over to or by the said Levin M. Powell at or before the alleged execution thereof by him?

Answer. Yes.

Third. Whether the said Levin M. Powell, at the time of the alleged signing of said paper-writing, was of sound and disposing mind and capable of executing a valid deed or contract?

Answer. Yes.

Fourth. Whether the said writing was executed by the said Levin M. Powell under the influence of suggestions, importunities, and undue persuasion of the said Harriet C. Stewart or any other person or persons when his mind, from its disordered, diseased, and enfeebled state, was unable to resist the same?

Answer. No.

Fifth. Whether the execution of said paper-writing was procured by fraud, misrepresentation, or undue influence or persuasion of the said Harriet C. Stewart or any other person or persons acting of their own volition or under the direction of the said Stewart?

Answer. No.

81 *Motion for New Trial. Filed April* 29, 1885.

In the Supreme Court of the District of Columbia.

In the Matter of the Issues of the Will of LEVIN M. POWELL.

And now come into court the caveatees, by their attorneys, E. E. McKay, J. J. Johnson, Wm. Stone Abert, and W. G. Johnson, and move the court to set aside the verdict rendered herein and grant a new trial for the following reasons:

1. That the evidence adduced in said trial was insufficient for said verdict.
2. Because said verdict was contrary to law.
3. Because it was contrary to the instructions of the court.
4. Because it is contrary to the evidence.
5. Because it is against the weight of the evidence.
6. And also upon exceptions taken by said caveators to the rulings of the court during the progress of the trial, and to each of the prayers granted to the said caveatees.

E. E. McKAY,
J. J. JOHNSON,
WM. STONE ABERT, AND
W. G. JOHNSON,
*Attorneys for Caveators.*

*Motion for New Trial Overruled. April* 29, 1885.

Upon the hearing of said motions for a new trial the same were overruled, and from the decision of said justice upon said motion so made and heard upon his minutes said caveators of said will appealed to the court in general term.

82 *Proceedings in General Term.*

Judgment general term affirming judgment of special term, October 30th, 1885.

In the Supreme Court of the District of Columbia. In General Term.

FRIDAY, *October* 30, 1885.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices James and Merrick.

SARAH C. COLMESNIL *et al.*, Caveators,
*vs.*
WILLIAM B. WEBB & CHARLES D. DRAKE, Caveatees.
} At Law. No. 26031.

Argument resumed by Mr. Abert, for the caveators, who was followed by Mr. J. J. Johnson, on the same side. Argument for caveatees dispensed with. Whereupon, because it appears to the court

here that there is no error in the record or proceedings or in the judgment of the special term, therefore it is considered that the judgment of the special term in the premises be, and it is hereby, affirmed, and the caveatees recover against the caveators, appellants, the costs of the cause, to be taxed by the clerk, and have execution thereof.

In testimony that the foregoing 71 pages print and the one page paper-writing purporting to be a copy of the final decree of general term herein is truly taken from the record of said court I hereto set the seal of said court and my hand November 5, 1885.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
*Ass't Clerk.*

83 *Proceeding- — Orphans' Court. 2d Hearing. Filed November 5th*, 1885.

In the Supreme Court of the District of Columbia. Special Term for Orphans' Court Business.

SARAH C. COLMESNIL, HAMILTON ORMSBY and EDMONIA ORMSBY, His Wife, Thomas W. Taylor, Eloise T. Taylor, Phillip B. Matthews, and Fanny I. Matthews, Caveators,
*vs.*
WILLIAM B. WEBB and CHARLES D. DRAKE, Caveatees.

And now come the said caveators, by their counsel, and file the record of the trial of the issues in the matter of the will of Levin M. Powell, deceased, and move this court, holding a special term for orphans' court business, to set aside the verdict of the jury upon the said issues for the following reasons:

1st. That the circuit court trying said issues erred in rejecting competent testimony.

84 2. That the said circuit court erred in the instructions given by it to the jury.

3d. That the said circuit court erred in refusing to instruct the jury as requested by the said caveators; and also upon exceptions taken by the said caveators to the rulings of the said circuit court during the progress of the trial of said issues; all of which will fully appear by the record hereto attached and made part hereof.

(Same as pp. 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, to 81, including intermediate pages of this record.)

J. J. JOHNSON AND
WILLIAM STONE ABERT,
*Attorneys for Caveators.*

*Order of Orphans' Court. Nov.* 6, 1885.

In the Supreme Court of the District of Columbia. Special Term for Orphans' Court Business.

SARAH C. COLMESNIL, HAMILTON ORMSBY and EDMONIA ORMSBY, His Wife; Thomas W. Taylor, Eloise T. Taylor, Phillip D. Matthews, and Fanny I. Matthews, Caveators,
*vs.*
WILLIAM B. WEBB and CHARLES D. DRAKE, Caveatees.

85 The foregoing and annexed motion of the caveators having been, this 6th day of November, A. D. 1885, heard and considered by the court, it is hereby ordered, adjudged, and decreed that the same be, and it is hereby, overruled.

A. B. HAGNER,
*Asso. Justice.*

*Exception. Filed Nov. 6th,* 1885.

The caveators except to the foregoing order overruling their motion, filed in this court on November 5th, 1885, to set aside the verdict of the jury upon the said issues in the matter of the will of Levin M. Powell, deceased.

WILLIAM STONE ABERT,
*Attorney for Caveators.*

*Order Admitting Will to Probate and Record and Granting Letters Testamentary to Charles D. Drake and Wm. B. Webb, Ex'rs. Filed Nov.* 6, 1885.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of LEVIN M. POWELL, Dec'd.

It is by the court, this 6th day of November, 1885, ordered that the will of Levin M. Powell be, and the same is hereby, admitted to probate and record, the issues sent from this court to the circuit court having been found in favor of the said will and so certified to this court, and that letters testamentary upon the estate of the said Levin M. Powell be, and the same are hereby, ordered to issue to Charles D. Drake and William B. Webb, the parties named therein
86 as executors, upon their filing a bond, conditioned for the faithful performance of their duties as such executors, in the sum of one hundred thousand dollars, with sureties to be approved by this court.

And it is further ordered that the said Charles D. Drake and William B. Webb, heretofore appointed collector *ad colligendum* of the personal estate of the said Powell, account in this court of and concerning the said trust.

A. B. HAGNER,
*Asso. Justice.*

*Appeal of the Caveators to Gen'l Term. Filed November* 17, 1885.

In the Supreme Court of the District of Columbia. Special Term for Orphans' Court Business.

SARAH C. COLMESNEIL, HAMILTON ORSMBY and EDMONIA Ormsby, His Wife; Thomas W. Taylor, Philip B. Matthews, and Fanny I. Matthews, Appellants,
*vs.*
WILLIAM B. WEBB and CHARLES D. DRAKE, Appellees.
} Probate. No. 1771.

*In re* the Estate of Levin M. Powell.

Enter an appeal to the court in general term from the order and decree of the special term for orphans' court business, passed the sixth (6th) day of November, 1885, admitting to probate and record the will of said Levin M. Powell and granting letters testamentary thereon.

J. J. JOHNSON AND
WILLIAM STONE ABERT,
*Attorneys for Appellants.*

To the register of wills, November 17, 1885.

87 *Motion by Defendants to Dismiss Appeal. Filed Feb'y* 18, 1886.

COLMESNEIL *et al.*
*vs.*
WM. B. WEBB *et al.*
} At Law. No. 26031.

And now comes the said defendants (and appellees) and move the court to dismiss the appeal in this case because the order or judgment complained of is not appealable.

ENOCH TOTTEN, *For Def'ts.*

*Decree of Gen'l Term. Passed Feb'y* 18, 1886.

In the Supreme Court of the District of Columbia, in General Term.

SARAH C. COLMESNIL *et al.*
*vs.*
WILLIAM B. WEBB *et al.*
} At Law. No. 26031.

This cause coming on to be heard upon the appeal from the order of the justice holding the special term for orphans' court business, passed the sixth day of November, A. D. 1885, overruling the motion of the appellants made therein on the 5th day of No-
88 vember, 1885, having been submitted to and considered by the court, it is by the court, this 18th day of February, A. D. 1886, ordered, adjudged, and decreed that the said order of the special term be, and the same is hereby, affirmed.

By the court:

D. K. CARTTER, *Ch'f Justice.*

89 AUTHENTICATION OF RECORD.

*Clerk's Certificate.*

CLERK'S OFFICE, SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 11th day of October, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
*Assistant Clerk.*

*Justice's Certificate.*

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 11th day of Oct., 1886.

D. K. CARTTER, [SEAL.]
*Chief Justice.*

*Clerk's Certificate to Justice's Official Character.*

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 11th day of Oct., 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
*Assistant Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 179. Hamilton Ormsby, Edmonia Ormsby, Thomas W. Taylor, Philip B. Mathews, Eloise T. Taylor, Fanny I. Mathews, and Sarah C. Colmesnil, plaintiffs in error, *vs.* William B. Webb and Charles D. Drake. Filed October 15, 1886.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

HAMILTON ORMSBY *et al.*, *Plaintiffs in Error*,

*vs.*

WILLIAM B. WEBB AND CHARLES D. DRAKE, *Defendants in Error.*

No. 1154.

## Record.—For Motion to Dismiss.

## Caveat.

[Filed in Orphans' Court Feb. 9th, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

*To the Honorable Judges of the Supreme Court of the District of Columbia, holding a Special Term of said Court for probate business:*

Your petitioner Sarah C. Colmesnil, of Louisville, in the State of Kentucky, respectfully shows unto your Honors that there has been presented to said Court, and is now on file therein, a certain paper-writing, which William B. Webb and Charles D. Drake has presented, and pretends that the same is the last will and testament of Levin M. Powell, late of the said district, now deceased.

Your petitioner further shows, and gives your Honors to know, that she is the daughter of the late Maj. Edmund H. Tayler, whose wife was Eloise Thurston, and the sister of Levin M. Powell's mother; that the said Levin M. Powell, deceased, left no widow, or children, or descendants; no

brothers or sisters; nor father or mother surviving him; and no decendants of any brother or sister; that he left your petitioner and few others as first cousins, and his only heirs at law.

Your petitioner is informed and verily believes, and so charges to this honorable Court, that the paper-writing aforesaid is not the last will and testament of the said Levin M. Powell, deceased, and that he never executed and published it as such, as required by law.

Your petitioner further represents that the said paper-writing, so alleged to be the last will and testament of the said Levin M. Powell, deceased, purports to bear date on the 27th day of October, A. D. 1884; and said petitioner is informed and believes that the said Levin M. Powell died in the said District of Columbia on or about the 15th day of January, A. D. 1885; that on the day, and at the time, it is claimed that he executed the said paper-writing, he was not of sound mind and disposing memory; that he had been very ill for some time; that he was in his eighty-second year and very feeble; that about three years ago he had a cataract removed from his eye; but at the time of his death, and for some time before, he had become bed-ridden and blind, and only recognized persons by their voice and names; that by reason of his old age and infirmities, his mind, at the time of the alleged execution of the said paper-writing, had become so weakened and demented that he had no memory, and was wholly unable and incompetent to have, express or execute the said paper-writing, or any will whatever.

Your petitioner further represents that she is informed and believes that the said Levin M. Powell was possessed, at the time of his death, of a very large estate, not less than $100,000. and that the said William B. Webb and Charles D. Drake are named as executors; that among the legatees named in said paper-writing is one Harriet C. Stewart, for a very large legacy, besides sharing in the residuary clause of said paper-writing; that petitioner is informed and believes that said Harriet C. Stewart came to the house of the said Levin M. Powell the night before the death of the wife of the said Levin M. Powell and has remained there ever since, and was there during the last illness of said Powell, having charge of and superintending all the affairs of the house, as well as managing the private business of said

Powell; that petitioner charges that if the said Powell's hand was placed to said paper-writing, it was not done by his will, but by the will, procurement, undue influence and fraud of the said Harriet C. Stewart, and that the execution of the said paper-writing was not the will or the act of the said Levin M. Powell, but the will and act of the said Harriet C. Stewart, and others in collusion with her.

Your petitioner therefore prays that all further proceedings looking to the probate of said paper-writing may be suspended until it can be determined as provided by law, whether the said paper-writing is the last will and testament of the said Levin M. Powell, deceased. That appropriate issues may be directed by the Court to be tried as provided by law. That in the mean time some proper persons may be appointed as collectors of said estate.

SARAH COURTNEY COLMESNIL.

THE STATE OF TEXAS, } *ss:*
*County of Harris.* }

I solemnly swear that I have read the above petition by me signed, and the facts therein stated upon information and belief, I believe to be true; and the facts therein stated of my own knowledge I know to be true.

SARAH COURTNEY COLMESNIL.

Sworn and subscribed to before me this 5th day of February, A. D., 1885.

[SEAL.] GARNETT HARDCASTLE,
*Notary Public, Harris County, Texas.*

Filed February 9, 1885.

On the 13th of February, 1885, Hamilton Ormsby and Edmonia E. Ormsby filed caveats. On the 16th of February, 1885, Thomas W. Tayler, Eloise T. Tayler, Philip P. Mathews and Fanny J. Mathews, also filed caveats.

## Notice to Fix Parties.

[Filed March 18, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF LEVIN M. POWELL, *deceased.* } No. 26,031.

*Gentlemen:*

Take notice that we will as propounders of the last will and testament of Levin M. Powell, deceased, on Thursday, the 12th day of March, 1885, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, call the attention of the Court in Special Term, as a Circuit Court, to the issues framed in the Court holding a Special Term for Orphans' Court, in the above matter, and will ask the said Circuit Court to make an order determining who are to be the parties plaintiffs and defendants to the said issues and directing the clerk of the Court to enter the same upon the docket of said Court in the name of said parties accordingly. And take notice further that we shall at the same time, also, ask the Court holding a Special Term as a Circuit Court, to fix an early day for the trial of said issues in accordance with the provisions of the act of the Assembly of Maryland in such case made and provided.

District of Columbia, to wit, I, H. Randall Webb, do depose and say that I have this 9th day of March, 1885, served copies of the above notice upon William S. Abert and J. J. Johnson, the attorneys and counselors for the parties contesting the will of the said Levin M. Powell.

H. RANDALL WEBB.

Sworn and subscribed to before me this 9th day of March, A. D., 1885.

HENRY R. ELLIOTT,

[SEAL.] *U. S. Com'r for the District of Columbia.*

## Order Settling Parties.

[Filed March 18, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Holding a Circuit Court.]

*In Re*—THE LAST WILL AND TESTAMENT OF LEVIN M. POWELL, *deceased.* } No. 26,031.

It appearing to the Court that by an order passed at a Special Term thereof, held for Orphans' Court business, on the 13th day of February, 1885, certain issues having relation to a certain paper propounded in that Court as the last will and testament of Levin M. Powell, deceased, were directed to be transmitted to this Court to be tried before a jury; it is this 13th day of March, 1885, ordered that Sarah Courtney Colmesnil, Thomas W. Tayler, Eloise Thurston Tayler, Philip P. Matthews, Fanny T. Matthews, Hamilton Ormsby and Edmonia Ormsby, Caveators, shall be plaintiffs, and Charles D. Drake and William B. Webb, the proponents of the last will and testament of Levin M. Powell, deceased, shall be defendants in the proceedings in the trial of the said issues, and that the Clerk of the Court will make entry of said proceedings, upon the docket of the Court, in due form in the said parties; and it is further ordered that the said issues shall stand ready for trial upon there being entered upon said docket as aforesaid, in every respect as if they had been regularly placed upon the trial calendar of this Court, and that the same shall stand and be set down for trial on the 15th day of April, 1885.

W. S. Cox, J.

## Proceedings in General Term.

Judgment General Term affirming Judgment of Special Term, October 30th, 1885.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[In General Term, Friday October 30th, 1885.]

Session resumed pursuant to adjournment.—Present Chief Justice CARTTER and Justices JAMES and MERRICK.

SARAH C. COLMESNIL *et al.*, *Caveators*, *vs.* WILLIAM B. WEBB AND CHARLES D. DRAKE, *Caveatees.* } At Law, No. 26031.

Argument resumed by Mr. Abert for the caveators, who is followed by Mr. J. J. Johnson on the same side. Argument for caveatees, dispensed with. Whereupon, because it appears to the Court here, that there is no error in the record or proceedings, or in the judgment of the Special Term. Therefore it is considered that the judgment of the Special Term in the premises be, and it is hereby affirmed; and the caveatees recover against the caveators, appellants, the costs of the cause, to be taxed by the Clerk, and have execution thereof. In testimony that the foregoing 71 pages print and the one page paper writing purporting to be a copy of the final decree of General Term herein is truly taken from the record of said Court, I hereto set the seal of said Court and my hand November 5th, 1885.

R. J. MEIGS, *Clerk.*
by L. P. WILLIAMS, *Ass't Clk.*

## Proceedings in Orphans' Court.—2d Hearing.

[Filed November 5th, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Special Term for Orphans' Court Business.]

SARAH C. COLMESNIL, HAMILTON ORMSBY AND EDMONIA ORMSBY, HIS WIFE, THOMAS W. TAYLER, ELOISE T. TAYLER, PHILIP B. MATTHEWS AND FANNIE T. MATTHEWS, *Caveators*, *vs.* WILLIAM B. WEBB AND CHARLES D. DRAKE, *Caveatees.*

And now come the said caveators, by their counsel, and file the record of the trial of the issues in the matter of the will of Levin M. Powell, deceased, and move this Court,

holding a Special Term for Orphan's Court business, to set aside the verdict of the jury upon the said issues, for the following reasons:

1. That the Circuit Court, trying said issues, erred in rejecting competent testimony.

2. That the said Circuit Court erred in the instructions given by it to the jury.

3. That the said Circuit Court erred in refusing to instruct the jury as requested by the said caveators, and also upon the exceptions taken by the said caveators to the rulings of the said Circuit Court during the progress of the trial of the said issues, all of which will fully appear by the record hereto attached and made part hereof.

(Same as pp. 5, 6, 7, 8, 9, 10, 11, 12, 13, 18 to 81, including intermediate pages of this record.)

J. J. JOHNSON AND
WM. STONE ABERT,
*Attorneys for Caveators.*

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## Order of Orphans' Court.

[Filed November 6, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Special Term for Orphans' Court Business.]

SARAH C. COLMESNIL, HAMILTON ORMSBY AND EDMONIA ORMSBY, HIS WIFE. THOMAS W. TAYLER, ELOISE T. TAYLER, PHILIP B. MATTHEWS AND FANNIE T. MATTHEWS, *Caveators.*

*vs.*

WILLIAM B. WEBB AND CHARLES D. DRAKE, *Caveatees.*

The foregoing and annexed motion of the caveators having been, this 6th day of November, A. D. 1885, heard and considered by the Court, it is hereby ordered, adjudged and decreed that the same be, and it is hereby, overruled.

A. B. HAGNER,
*Asso. Justice.*

[Exception filed Nov. 6th, 1885.]

The caveators except to the foregoing order, overruling their motion filed in this Court on November 5th, 1885, to set aside the verdict of the jury upon the said issues in the matter of the will of Levin M Powell, deceased.

WILLIAM STONE ABERT,
*Attorney for Caveators.*

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## Order Admitting Will to Probate and Record, and Granting Letters Testamentary to Charles D. Drake and William B. Webb, Executors.

[Filed Nov. 6th, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Holding a Special Term for Orphans' Court business.]

IN THE MATTER OF THE ESTATE OF LEVIN M. POWELL, *deceased.*

It is by the Court, this 6th day of November, 1885, ordered that the will of Levin M. Powell be, and the same is hereby admitted to probate and record, the issues sent from this Court to the Circuit Court, having been found in favor of the said will and so certified to this Court, and that letters testamentary upon the estate of the said Levin M. Powell be, and the same are hereby ordered, to issue to Charles D. Drake and William B. Webb, the parties named therein as executors, upon their filing a bond conditioned for the faithful performance of their duties, as such executors in the sum of one hundred thousand dollars, with sureties to be approved by this Court.

And it is further ordered that the said Charles D. Drake and William B. Webb heretofore appointed collectors *ad colligendum* of the personal estate of the said Powell account in this Court of and concerning the said trust.

A. B. HAGNER,
*Asso. Justice.*

## Appeal of the Caveators to General Term.

[Filed November 17, 1885.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Special Term for Orphans' Court Business.]

| | |
|---|---|
| SARAH C. COLMESNIL, HAMILTON ORMSBY AND EDMONIA ORMSBY, HIS WIFE, THOMAS W. TAYLER ELOISE T. TAYLER, PHILIP B. MATHEWS, AND FANNY T MATHEWS, *appellants*, *vs.* WILLIAM B. WEBB AND CHARLES D. DRAKE, *appellees* | Probate.—No. 1,771. |

*In Re* the estate of Levin M. Powell.

Enter an appeal to the Court in General Term from the order and decree of the Special Term for Orphans' Court business passed the sixth (6th) day of November, 1885, admitting to probate and record the will of said Levin M. Powell and granting letters testamentary thereon.

J. J. JOHNSON,
WILLIAM STONE ABERT,
*Attorneys for Appellants.*

To the Register of Wills, November 17, 1885.

## Motion by Defendants to Dismiss Appeal.

[Filed February 18, 1886.]

| | |
|---|---|
| COLMESNIL *et al.*, *vs.* WILLIAM B. WEBB *et al*, | At Law.—No. 26,031. |

And now come the said defendants (and appellees) and move the Court to dismiss the appeal in this case because the order or judgment complained of is not appealable.

ENOCH TOTTEN,
*For Defendants.*

## Decree of General Term Passed February 18, 1886.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[In General Term.]

SARAH C. COLMESING *et al.*,
*vs.*
WILLIAM B. WEBB, *et al.*, } At Law.—No. 26,031.

This cause coming on to be heard upon the appeal from the order of the justice holding the Special Term for Orphans' Court business passed the sixth day of November, A. D., 1885, overruling the motion of the appellants made therein on the 5th day of November, 1885, having been submitted to and considered by the Court, it is by the Court, this 18th day of February, A. D., 1886, ordered, adjudged and decreed that the said order of the Special Term be and the same is hereby affirmed.

By the Court.

D. K. CARTTER,
*Chief Justice.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

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HAMILTON ORMSBY *et al.*, *Plaintiffs in Error*,
*vs.*
WILLIAM B. WEBB AND CHARLES D. DRAKE,
} No. 1154.

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## Motion to Dismiss or Affirm.

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And now come the defendants in error and move the court to dismiss the writ of error in this cause for want of jurisdiction, because the judgment of the Supreme Court of the District of Columbia to which said writ of error was directed is not a final judgment; or if the writ of error shall not be dismissed, that the judgment of the said court be affirmed, on the ground that, although in the opinion of this court the record may show that this court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

ENOCH TOTTEN,
*For the Defendants in Error.*

# *Supreme Court of the United States.*

OCTOBER TERM, 1889.

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HAMILTON ORMSBY *et al.*,
*Plaintiff in Error,*

*vs.*

WILLIAM B. WEBB AND
CHARLES D. DRAKE.

No. 179.

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**Motion to Dismiss Writ of Error.**

And now come the said defendants in error and move the court to dismiss the writ of error herein because this is a case of equity jurisdiction, and could have been brought here only by an appeal, according to the statute in such case made and provided.

ENOCH TOTTEN,
WM. B. WEBB,
*For Plt'f in Error.*

# In the Supreme Court of the United States.

—o—

OCTOBER TERM, 1886.

—o—

HAMILTON ORMSBY, ET. AL., Plaintiffs in Error,
*vs.*
WILLIAM B. WEBB AND CHARLES D. DRAKE.
} At Law.—No. 1,154.

—o—

## BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

—o—

The will of the late Admiral Levin M. Powell is contested by his heirs-at-law, on the ground of mental incapacity, and the undue influence of Mrs. Harriet C. Stewart, a second cousin of the Admiral, on the Powell side of his family. And out of an estate of more than $105,000 in value, descended to him through his maternal grandfather, Charles M. Thruston, (whose will the Admiral successfully contested, *vide* 11 La. Rep., p. 426, Conrad *vs.* Thruston), the said Levin M. Powell bequeaths to the survivors of that family not one dollar, except to Mrs. Susan Brand, his own first cousin, the income for life arising from $3,000; the remainder thereof to the trustees of the Garfield Memorial Hospital. The Admiral died in Washington, D. C., on the 15th of January, 1885, leaving the will in contest, dated October 27th 1884.

If in point of fact, it is true, that the estate of Admiral Powell, descended to him through his mother, then it is contended on the part of the appellants, that if the Admiral had died intestate, his estate would, under the laws in force in the District of Columbia, have descended to the contestants and Mrs. Susan Brand, to the exclusion of all the other devisees and legatees mentioned in the will (See Thompson's Digest D. C., p. 179).

Admiral Powell never had any children ; his wife died in December, 1880, and he died in January, 1885. Had he survived until April he would have completed his eighty-second year.

On the 20th day of January, 1885, the will in contest was offered for probate and record in the Supreme Court of the District of Columbia, (sitting as an Orphans' Court for probate business,) by the defendants in error, the executors named in the said will.

On the 5th day of February, 1885, and within a few days thereafter the contestants, and now plaintiffs in error filed *caveats* and opposed the probate of said will, on the ground of (1) want of testamentary capacity in said Levin M. Powell, and also (2) because it was averred that the alleged will had been procured by fraud and undue influence.

On the 13th day of February, 1885, an order was made by the special term of said court directing that issues of fact be tried by jury in the Circuit Court, which orders and issues are as follows:

(See old Record, p. 7.)

"Upon consideration of the petition of Charles D. Drake and William B. Webb, propounding as the last will and testament of the said Levin M. Powell, a certain paper-writing bearing date on the 27th of October, 1884, and the petition and caveat of Sarah Courtney Colmesnil, denying the said paper-writing, is the said last will and testament of the said Levin M. Powell, it is this 13th day of Feb-

ruary, 1885, ordered, adjudged, and decree that the following issues be transmitted to be tried in the Circuit Court before a jury, viz:

*First.* Whether the said paper-writing, purporting to be the last will and testament of the said Levin M. Powell, bearing date on the 27th of October, 1884. was executed and attested in due form of law.

*Second.* Whether the contents of said paper-writing were read to or by the said Levin M. Powell at or before the alleged execution thereof by him.

*Third.* Whether the said Levin M. Powell, at the time of the alleged signing of said paper-writing, was of sound and disposing mind and capable of executing a valid deed or contract.

*Fourth.* Whether the said writing was executed by the said Levin M. Powell, under the influence of suggestions, importunities, and undue persuasions of the said Harriet C. Stewart, or any other person or persons, when his mind, from its disordered, diseased, and enfeebled state was unable to resist the same.

*Fifth.* Whether the execution of said paper-writing was procured by fraud, misrepresentation, or undue influence or persuasion of the said Harriet C. Stewart, or any other person or persons, acting of their own volition or under the direction of the said Stewart."

These issues were sent from one special term of said court *i. e.* the term for Orphans' Court and probate business to another special term of said court holding a Circuit Court, and the said issues were tried before a jury (Mr. Justice Cox presiding, and under instructions of the said justice, which instructions, it is contended, left the jury no decretion whatever) the jury rendered a verdict sustaining the will.

Exceptions were taken to the rulings of the court during the trial, and a motion for a new trial based upon these

exceptions was made in behalf of the contestants and overruled ; and from the rulings of said justice the said contestants appealed to the court in general term.

On the 30th of October, 1885, the rulings of the trial court were affirmed by the general term, thereafter the contestants filed in the said special term, sitting as an Orphan's Court for probate business, a complete record of all the evidence, rulings, answers to issues, verdict and decisions of the general term, duly certified by the clerk, and moved the said court from which the issues eminated ; to set aside the verdict and grant a new trial.

The contestants did not appeal to this court from the first decision of the general term ; because in the light of the decision of the case of Wiley *vs.* Brown, reported in 4Wallace, p. 171, no final order had been passed: "*but the cause went to the Orphan's Court for "final judgment.*"

There could be no final judgment in the cause until the Probate Court passed an order admitting the will to probate and record.

And in the language of the learned counsel for the defendants in error, page 3 of his brief: "Proceeding immediately to *give effect* to the verdict of the jury, the special "term (on motion of the executors) ordered that the will "be admitted to probate (and record,) and that letters testamentory be issued to the executors named in the will."

The whole contest in this case has been as to the probate and record of the said will, and "*the controversy* as "to the validity of that probate was a matter in dispute "equal to the value of the estate devised away from the "heirs, ($105,000,) 8 Cranch, U. S. 252. Carters *vs.* Cutting.) The order of the Orphans' Court, admitting the will to probate, was passed on the same day that the said court overruled the contestant's motion for a new trial, to-wit: November 6th, 1885.

And on the 17th of November, 1885, the contestants

appealed to the said court in general term, from the said order and decree of the said special term for Orphans' Court business, admitting to probate and record the said will of the said Levin M. Powell, and granting letters testamentary thereon. (Record of motion to dismiss, p. 9.)

The court in general term on this second appeal, affirmed the decisions of the said special term, and as the general term in this second appeal for the first time has passed a "final judgment," the plaintiffs in error have appealed to this court, and brought the case up upon a Writ of Error.

And it is submitted that the motion of the defendants in error to dismiss or affirm, as a case of delay only, should be overruled.

## POINTS AND AUTHORITIES.

*First.* The plaintiffs in error insist that this court has jurisdiction to review the said final orders and judgments complained of.

*Second.* That the Writ of Error is not taken for delay, and that the questions upon which jurisdiction depend are not frivolous, but that the plaintiffs in error are entitled to a new trial.

On the question of the jurisdiction, the following authorities are relied upon as decissive, and supporting the correctness of onr position beyond all doubt:

8 Cranch U. S. Rep. 251 Carters *vs.* Cuttings.
19 Wallace Rep., 62. Railroad *vs.* Church.
4 Cranch U. S. Rep. 384. Young *vs.* Bank.

By section 92 Revised Statutes of the United States, relating to the District of Columbia, we find, enacted by Congress, viz:

"The laws of the State of Maryland not inconsistent

"with this title, as the same existed on the 27th day of "February, 1801, except as since modified or repealed by "Congress, or by authority thereof, or until so modified or "repealed, continue in force within the District."

In the said Revision of Statutes of the District of Columbia, approved June 22, 1874, we find included the acts of March 3, 1863, (see section 846 of said Revised Statutes,) which reads as follows:

"Any final judgment, order or decree of the Supreme "Court of the District may be re-examined and reversed "or affirmed in the Supreme Court of the United States "upon Writ of Error or appeal, in the same cases and in "like manner as provided by law in reference to final judg- "ments, orders and decrees of the Circuit Courts of the "United States."

The subsequent acts of Congress do not alter the right of appeal to this court from "*any final judgment*" *order or decree* of the Supreme Court of the District of Columbia, except to increase the jurisdictional amount, and appeals in will cases are not in any manner excluded from the general operation of these laws.

The learned opposing counsel admits in his brief (p. 9,) that "the verdict of the jury in such a proceeding cannot be set aside except by the trial judge or by the court in general term. Clearly if the general term improperly affirmed the judgment of the Orphans' Court, and improperly refused a new trial, then this court can look through the whole record and grant a new trial, if the plaintiffs were entitled to one. The counsel for the defendants in error contends that "the *final* judgement was made *by the jury*," and "In fact the *order* was not necessary." Yet on page 6 of his brief, he makes an extract from the old law of Maryland regulating the form of proceeding in contests like this, and that statute of Maryland

declares that "*the Orphan's Court* shall give judgment or decree upon the * * * *finding of the jury*.

This direction contained in the statute was mandatory, and when as a condition precedent the Orphans' Court had certified to it, the complete record and findings of the jury, the said court was bound to enter the final judgment, and from that the contestants appealed to the general term and thence to this court.

By section 92 of the Revised Statutes of the District of Columbia, the laws of Maryland became the statute law of the District of Columbia, just as if those laws had been for the first time enacted by Congress, as of the date June 22, 1874. If therefore the verdict by the jury upon the issues in a will contest was final (?) the subsequent act of Congress (February 25, 1879, 20 Stat. L. p. 329,) by its fifth section repealed the former law, and by the fourth section of the said act "final judgments" of the Supreme Court of the District of Columbia may be re-examined in this court.

It this contest had been originally instituted in the Supreme Court of the District of Columbia, holding a special term for the trial of law cases with a jury, there would be no question of the right of appeal to this court from the decision of the general term affirming the rulings of the trial judge.

We refer the court to 2 Kilty's Laws of Maryland, Chap. 101, Sub. Chap. 8, S. 20, as quoted upon p. 7 of the brief for the defendants in error. This said statute referring to the trial of issues in will cases, etc., declares: "*and the "court of law shall* have power to direct the jury, and "grant a new trial, as if the issue or issues were in a suit "therein instituted," etc.

Therefore there can be no doubt that this court has jurisdiction of this writ of error.

All the questions of law, made during the progress of this case, and properly excepted to, are brought here for

review. And this court has power to look through the whole record and grant a new trial if it be deemed proper.

The case of Van Ness *vs.* Van Ness is supposed by counsel opposed to be conclusive as to the present motion ; but the difference between that case and the present, arising from the act of March 3, 1863, abolishing the Circuit Court and organizing the Supreme Court of the District of Columbia, is most manifest.

As the law stood when Van Ness *vs.* Van Ness was tried, the Circuit Court had not the power to enter judgment. It could, after the rendition of the verdict, grant a new trial, but could do nothing more.

The Circuit Court had no power to do more than certify the record and finding of the jury. That really was no judgment or order in any legal sense. It was simply a certificate of physical fact of record, and is so treated in Van Ness *vs.* Van Ness. The case is wholly different under the law of March 3, 1865.

By the first clause of the eight section of that act, at the trial of any cause, the right to except is allowed.

In the present case the record shows that the Bills of Exception were regularly taken at the trial, in conformity with the statutes of Westm., 2, adopted in the State of Maryland before the cession of this District.

The plain distinction, then, between the Van Ness *vs.* Van Ness and the present case is, that in the former the Circuit Court had no control over the verdict, save simply to grant in its discretion, a new trial, which was never applied for ; and the refusal to grant which, if asked, could not support a writ of error. While in this case the verdict was in the keeping of the Supreme Court of the District in General Term, whose duty it was to review the exceptions taken at the trial and settled by the court below, and if well taken, entitled the party to a new trial wholly irrespective of the discretion of the trial court.

The construction of the law was fixed by the rule of the court below (old rule 79,) whereby it is provided, that in case of misdirection or where evidence is improperly re- or rejected, a new trial "shall be granted as of right."

By second clause of the above section of the act of 1863, the judge who tries the cause may, after the trial, and though no exception be taken at the trial, entertain in his discretion a motion for a new trial, upon exceptions offered as for insufficient evidence, or for excessive damages.

There was, then, in the present case, judical judgment, in the strictest legal sense of the term, to be exercised by the Supreme Court of the District, and that judgment, when it passed into record, determined the controversy, both in the court below and the Orphans' Court, and yet it is contended on this motion that the action of a court which adjudges such determination in a particular way, though in form and substance a judgment, is neither a final judgment nor a final order.

## ASSIGNMENT OF ERRORS.

The following are the errors insisted upon:

### I.

The trial court erred in giving the following instructions to the jury.

We quote from Bill of Exception No. 8, p. 8, old record:

"If the jury believe from the evidence that Mrs. Harriet "C. Stewart, for the purpose of influencing said Levin M. "Powell in making his will, raised prejudices in the mind "of said Powell against those who would otherwise have "been the natural objects of his bounty, and by contrivance "kept him from intercourse with such persons to the end "that those prejudices or impressions which she knew he "had thus formed to the disadvantage of such persons, (if

"the jury so believed,) might be removed, then the jury "are entitled to consider these facts in connection with "other facts in the case in deciding the issue relative "to undue influence. But such facts would not of them- "selves amount to such proof as the law reguires of undue "influence sufficient to invalidate the will."

II.

"If the jury shall believe the evidence of Mrs. Harriet C. Stewart, upon the subject of undue influence given by her in this case, then the verdict must be in favor of the defendants and in support of the will." (See No. 10 Bill of Exception, p. 69, old record.

III.

"That the burden of proof is on the caveator in this case to satisfy the jury that the will offered in evidence was induced by undue influence, and that unless the jury shall be so satisfied their verdict must be for the defendant." (p. 69, old record No. IX.)

IV.

"If the jury believe from the evidence that the said Harriet C. Stewart is a beneficiary under said will, and that she was instrumental in procuring the preparation and execution of the same, and if they further believe from the evidence that at and before the execution of the said will, the said Stewart prevented certain of the next of kin or heirs-at-law of said testator, who are injured by said will from having access to him; that shortly before that time she willfully misrepresented any of such next of kin or heirs-at-law to the said testator, they may infer from such circumstances that Harriet C. Stewart did unduly influence said testator in the execution of said will." (p. 67, old record, VII. Refused, Exception.)

V.

"If the jury believe from the evidence that the paper-writing purporting to be the last will and testament of Levin M. Powell is arbitary and unjust and largely in favor of Harriet C Stewart, and that said Stewart was the nurse for and held confidential relations with said Powell at the time of the alleged execution of the said paper, and for a long time prior thereto, and that said Stewart as such nurse and confident might have improperly and unlawfully influenced the testator's mind, then slight evidence of such unlawful influence is sufficient to invalidate said will unless rebutted by other proof." (p. 66, V. Refused, Exception.)

VI.

"Evidence that the said legatee, Harriet C. Stewart, improperly influenced the testator as to other important matters and things than the execution of said will is proper to be considered by the jury as tending to show that she could and did improperly influence him to make the bequests in her favor or to exclude others of his next of kin and heirs-at-law from participation in his estate." (p. 66, VI, old record. Refused, Exception.)

VII.

The trial judge erred in excluding the following testimony. We quote from Bill of Exceptions No. 1, p 8, old record:

"Be it remembered that at the trial of this cause, the caveators, to maintain the issue on their part joined, offered the testimony of James G. Colmesnil tending to prove that the descendent and alleged testator had told the witness that he received the bulk of his estate by breaking the will of his grandfather, Charles M. Thruston, who was also the ancestor of the caveators, and that his estate consisted in a great degree of that property with its accumulations." (Excluded and exception, p. 8-9, old record.)

IX.

The trial judge erred in excluding the following testimony. We quote from Bill of Exceptions, No. 2, p. 9, old record:

"Be it remembered, that at the trial of this cause the caveators, to maintain the issue on their part joined, offered in evidence the testimony of Alice S. Condon, the nurse of Admiral Powell during his last sickness, tending to show that during the time that witness was in the Admirals's house as such nurse and prior to the death of the Admiral, and after the time of the alleged execution of said will, Mrs. Harriet C. Stewart, a specific and residuary legatee, named in the said alleged will, had told the witness that she, Mrs. Stewart, had gotten under the will what she wanted; that she wanted no more, no less than that; that the will was made as she wanted it, and that she was there in the family in the place of Mrs. Powell herself,—the Admiral's wife." (Excluded and exception, p. 9, old record.)

X.

The trial judge erred in excluding the following testimony. We quote from Bill of Exceptions, No. 3, p. 9, old record:

"Be it further remembered that at the trial of this cause the caveators, to maintain the issue on their part joined, offered the testimony of Gates P. Thruston, tending to prove that subsequent to the execution of the alleged will, and during the life time of Levin M. Powell, the said witness had a conversation with Mrs. Harriet C. Stewart, a specific and residuary legatee, under the said will in which the witness asked Mrs. Stewart why it was that the Weeks girls were left something in the first will and nothing in the last; that the said Mrs. Stewart replied that they tried to prejudice the Admiral against her, and she

Mrs. Stewart, had had them left out of the last will on that account." (Excluded and exception.)

The foregoing assignments of error clearly establish the fact, that the judgment should not be affirmed as a delay case, because the questions involved are not frivolous but well worthy of mature and full argument.

The mental strength and condition of the testator is directly in issue in every case of alleged undue influence ; it is therefore erroneous and fatally misleading for the trial judge to instruct peremptorily on either question.

If two instructions given to the jury are contradictory, *i. e.*: the one submitting to them, and the other withdrawing from them, the same question of fact, the verdict will be set aside.

52 California Rep. 466, Cunningham's Estate.

By instruction, at top of p. 65 of old record, the trial judge submitted to the jury the question of said Powell's testamentary capacity, and by the instruction contained in the 10th Bill of Exceptions (p. 69 old record), the court excluded from the jury the question of capacity. The last instruction was equivalent to a peremptory instruction in favor of the testator's capacity to make a will and directed the jury to dispose of both issues upon the testimony of one witness upon only one of the issues; the said instruction, p. 9–10 this brief, was therefore erroneous.

50 Md. Rep. p. 469–488, Griffith *vs.* Diffenderffer.

A peremptory instruction to the jury can be properly given only when the state of the evidence is such as to leave *no room for doubt* that it is the duty of the jury to find accordingly.

99 U. S Rep. 580, Pence vs. Langdon.

This same instruction would have been improper and misleading even if it had been limited by the court to

Mrs. Stewart's testimony on the question of undue influence alone. For the instruction attaches an undue weight to the testimeny of one witness testifying to events occurring during a period when she was in such a condition as to render her incompetent to testify with accuracy on any subject, as opposed to the testimony of many witnesses whose testimony is unimpeached by inebriety in any one of them. See the testimony of Dr. W. W. Johnston. p. 14, Geo Perigo, p. 17, and Miss Condon, p. 17.

If the facts stated in the instruction contained in the 8th Bill of Exception, (it being No 1 of our Assignment of Errors), do not constitute undue influence sufficient to invalidate a will, it is difficult to understand what is such undue influence.

This instruction, which we insist is erreneous, (unsupported by the authorities,) deprived the jury of all discretion, and is opposed to the decision of the Court of Appeals of Maryland, see :

60 Md. Rep. p. 294, Layman *vs.* Conray.
50 " " p. 472, 488, Griffith *vs.* Diffendeffer.
81 Ky. Rep. 244, Shirley's will.
11 Stewart N. J. Rep. 277, Dale *vs.* Dale.
41 Penn. St. Rep. 312, Dean *vs.* Negley.
25 N. Y. Rep. 41, Delafield *vs.* Parish.
35 N. Y. Rep. 559—592, Tyler *vs.* Gardner.
63 N. Y. Rep. 219, McLaughlin *vs.* McDevitt.
15 N. J. Eq. Rep. 370, Blauvelt *vs.* Moore.
109 Mass. Rep. 171, Lewis *vs.* Mason.
6 House of Lords. Cases p. 51.
11 Abb. Pr. Rep. 214, Lee *vs.* Dill.
22 Hun. N. Y. Rep. 42.
22 " " " 543, 546.
94 U. S. Repts, p 511, Allore *vs.* Jewell.
1 Redfield on Wills p. 530, Sec. 43 (3d Ed.)

Direct evidence of fraud and undue influence is diffi-

cult to obtain, and should not be required where the whole surroundings indicate its existence.

It can generally be proved only by a series of circumstances, each comparatively small in itself, but taken together the conclusion is irresistable.

94 U. S. 508, Allore *vs.* Jewell.
35 N. Y. Rep. 595, Taylor *vs.* Gardner.
22 Hun. N. Y. Rep. 43 Swenarton *vs.* Hancock.
47 Mich. Rep. 324, Porter *vs.* Throop.

The rejected testimony of Gates Thruston and Miss Condon was competent :

13 Bush Ky. 167, Milton *vs.* Hunter.
1 Ben. Mon. Ky. 401, Bell *vs.* Cunningham.
109 Mass. Rep. 173, Lewis *vs.* Mason.
21 Ga. Rep. 552, Morris *vs.* Stokes.
5 Gill & J. Md. Rep. 270, 307, 308.

The rejected testimony of J. G. Colmesnil was competent :

50 Md. Rep. 482, Griffith *vs.* Diffenderffer.
29 Conn. Rep. 399–405, Dennison's Appeal.
133 Mass. Rep. 428.
46 Cal. Rep. 629.
11 Stewart N. J. Rep. 277.
15 N. J. Eq. R. 243.
11 N. Y. Rep. 165, 166.

The testimony of Dr. Wm. W. Johnston, a distinguished physician of high character, shows that Admiral Powell died of old age, and that he was under the influence of Mrs. Stewart and almost absolutely dependent upon her. (p. 13, 14 old record.)

Mrs. Stewart is a legatee under that will for about $20,000.

If this court should, upon the final hearing of this cause, reverse the judgment of the General Term, there

will not be left standing "*either an irrevocable verdict or a valid will.*" But the issues may be retried before another jury and with different instructions on the questions involved, especially the question of undue influence.

This is an important case, and involves the question of the right of appeal in the District of Columbia to this Court in a will case; it is also important to have the question of the law of undue influence as affecting wills settled, by a decision of this court. These issues should not be decided without a full argument of the important questions involved.

We submit in conclusion that the motions to dismiss or affirm should be overruled.

WILLIAM STONE ABERT,
J. J. JOHNSON,
*For Appellants.*

IN THE

# *Supreme Court of the United States.*

OCTOBER TERM, 1889.

HAMILTON ORMSBY *et al.*,
*Plaintiffs in Error,*

*vs.*

WILLIAM B. WEBB *et al.*,
*Defendants in Error.*

No. 179.

## Plaintiff's Brief in Reply.

JOHN J. JOHNSON,
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WM. G. JOHNSON,
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R. O. Polkinhorn, Printer.

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No. 179.

## Plaintiff's Brief in Reply.

Since the filing of the brief by plaintiffs in Error, the defendants have filed a motion to dismiss the writ of error in this cause, the motion being as follows:

> "And now come the said defendants in error and move the court to dismiss the writ of error herein, *because this is a case of equity jurisdiction*, and could have been brought here only by an appeal, according to the statute in such case made and provided."

A similar motion was made at October Term, 1886, in the following terms:

> "And now come the defendants in error and move the court to dismiss the writ of error in this cause for want of jurisdiction, because the

> judgment of the Supreme Court of the District of Columbia to which said writ of error was directed is not a final judgment; or if the writ of error shall not be dismissed, that the judgment of the said court be affirmed, on the ground that, although in the opinion of this court, the record may show that this court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument."

This last recited motion was submitted upon printed arguments under the rules, and denied by this court at the same term.

*Ormsby* vs. *Webb*, 122 U. S., 630.

It will be observed that the foundation of both motions is want of jurisdiction in this court, though a different reason is set up in each. In the first motion the ground relied on was that the judgment to which the writ of error is directed is not a final judgment, while the present motion objects to the jurisdiction on the ground that the case should have been brought here by appeal and not by writ of error.

It may, perhaps, be assumed that in denying the previous motion to dismiss for want of jurisdiction, this court considered and disposed of all objections to jurisdiction apparent upon the face of the record, and that as the record shows the case to be here by writ of error, and also the character of the case, the jurisdiction is no longer an open question in this court.

But supposing for the argument that the view just expressed does not dispose of the matter, it is submitted that there is no foundation for the motion.

I.

The first point of the defendants in error is that "This court is without jurisdiction to review this cause, *because it is a case of equity jurisdiction*, and can not be brought into the Supreme Court for review on a writ of error," &c. (Defendants' brief, p. 4).

It is conceded that if the case at bar be one of equity jurisdiction, it cannot be brought here by writ of error, and the jurisdiction of the corut must therefore fail; but it is denied that the case is one of equity jurisdiction.

This was a proceeding by the defendants in error, to establish, as the last will and testament of one Levin M. Powell, a certain paper writing (set out on pages four to nine of the record), and for letters testamentary. The application was made to the Supreme Court of the District of Columbia, at a special term authorized by law to hear and determine the same, and was resisted by the plaintiffs in error. No formal pleadings were had or required, and issues were framed (Rec., 4), and directed to be tried before a jury at a special term of said court sitting as a Circuit Court. At the trial of these issues exceptions were taken to the rulings of the trial justice. (Rec., 10, 11, 12, 53, 54, 55, 56). A verdict was rendered sustaining the will (Rec., 56), and a judgment entered thereon admitting the said paper to probate and record as the last will and testament of the said Levin M. Powell, and directing letters testamentary to issue to the defendants in error. (Rec., 59). From this judgment the plaintiffs in error appeale l to the General Term (Rec., 60), and the same was

there affirmed. (Addl. Rec., p. 3.) Thereupon the plaintiffs in error sued out their writ of error.

It is not contended that the case is one of common law jurisdiction, though it is obvious from the character of the proceedings that (with the exception of the pleadings) it is analogous thereto; but whatever view may be taken on that point, it is clear the case is not one of equitable jurisdiction. The only objects of the proceedings were the establishment of a will and securing letters testamentary by the defendants in error, and the validity of that will and the right to such letters are the only questions litigated and the only questions concluded by the judgment rendered.

It is not material, at this stage, to consider what inferences might be drawn from the facts stated in defendants' brief (brief, p. 4) that "the proceedings in the special term of the court below, when in the exercise of probate jurisdiction, are conducted by means of the same forms and in the same manner and by the same justice as are those relating to the exercise of general chancery jurisdiction," as the jurisdiction of equity over the subject matter involved in this case has been already considered and set at rest by this court.

In discussing the jurisdiction of equity to establish or set aside wills this court has said: "It is well settled that no such jurisdiction belongs to the circuit courts of the United States as courts of equity; for *courts of equity as such by virtue of their general authority to enforce equitable rights and remedies do not administer relief in such cases.* The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of Broderick's will

21 Wallace, 503. It was elaborately considered and finally determined in England by the House of Lords in the case of *Allen* vs. *McPherson* 1 House Lord's Cas. 191. In that country it was undoubtedly the practice of courts of chancery to entertain bills to perpetuate the testimony of the witneses to a will devising lands at the suit of the devisee against the heirs at law, it being alleged that the latter disputed its validity; and this, as Blackstone says (3 Bl. Com., 450), 'is what is usually meant by proving a will in chancery.' "

*Ellis* vs. *Davis*, 109 U. S., 485, 494.

Again, it was held by this court "to be the settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate. * * * * * The same principles substantially have been adopted by most of the courts having equity jurisdiction in this country. * * * *

> "On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the probate court; *in such a case a court of equity will not interfere, for it has no jurisdiction to do so.*"

*Broderick's Will*, 21 Wall., 503, 512, 517.

The principles above announced are sustained by other adjudications of this court.

*Gaines* vs. *Chew*, 2 How., 619, 645.
*Gaines* vs. *Fuentes*, 92 U. S., 10, 21.

In view of these decisions it may safely be asserted, without further argument, that the case at bar is not one of equity jurisdiction.

Defendants in error in their brief rely upon section 692 of the Revised Statutes of the United States (Brief p. 4) which is the revision of the act of March 3, 1803, (2 St. 244) as authority for bringing this case to this court by appeal instead of by writ of error. It is submitted, however, that the act referred to is not susceptible of such construction. As held by this court,

> "The Judiciary act of 1789 gave appellate jurisdiction to this court by writ of error, and it was held that under that act no cause could be brought here by appeal. *Blaine* vs. *Ship Charles Carter*, 4 Dallas, 23.
>
> The act of 1803 gave appellate jurisdiction by appeal 'from final judgments and decrees in cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize.' *No other cases can be brought here in this mode*, and the case in the record is of neither class. It must come here, if at all, upon writ of error."
>
> *Jones* vs. *La Vallette*, 5 Wall., 579.

The application of the above decisions to the case at bar is so obvious as to render further comment superfluous. Nevertheless, it may be added that "an appeal is a process of civil law origin, and removes the cause entirely; subjecting the fact as well as the law to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law."

*Wiscart* vs. *D'Auchy*, 3 Dallas, 327.

The facts in this case, as appears by the record, were determined by the verdict of a jury (Rec., p. 56), and are not therefore re-examinable by this or any other court. So that even were there no decisions to the contrary the impropriety of an appeal to bring the case here is most obvious.

II.

Defendant's second proposition is that "The decree of the special term admitting the will to probate and granting letters testamentary was made in accordance with the requirements of the statute and was rightly made."

It is not necessary to the consideration of this proposition to question the construction of the various provisions of the act of assembly of Maryland, referred to by defendants in their brief, nor the interpretations given to the decisions of the court of appeals of Maryland cited in this connection. The argument of the brief culminates in two propositions; first, that a verdict having been rendered upon the issues it was final and conclusive, and that a judgment in accordance therewith was required to be entered by statutory direction, irrespective of any errors of law committed by the trial justice which may have contributed to produce the verdict; and secondly, that this court can give no direction as to further proceedings in the event of a reversal.

It is considered by the defendants that the decisions of this court in the cases of *Van Ness* vs. *Van Ness*, 6 How., 62, and of *Brown* vs. *Wylie*, 4 Wall. 165, support these positions. It is submitted, however, that those decisions must be considered and ap-

plied with reference to the facts, the state of the law and the constitution of the courts, whose proceedings were to be reviewed, as they existed at the time those decisions were rendered, and that in that view they are without application to the case at bar. The case of *Van Ness* vs. *Van Ness* came before this court in 1848, and the case of *Brown* vs. *Wylie* in 1866.

In 1848 the judicial power of the county of Washington and District of Columbia was vested in two separate and independent tribunals, the circuit court of the District of Columbia and the orphans' court for said county, (2 Stats., sections 3 and 12, pp. 105 and 107.)

In 1866 the judicial power of the District of Columbia was still vested in two separate and independent tribunals, the said orphans' court and the supreme court of the District of Columbia, 12 stats., p. 762 and 765.

By section 12, of the act of 1801 (2 Stats., 107), it is provided, *inter alia*, that "there shall be appointed * * * a judge to be called the judge of the orphans' court, who shall have all the powers, perform all the duties, and receive the like fees as are exercised, performed, and received by the * * * judges of the orphans' court within the State of Maryland; and appeals from said court shall be to the circuit court of said district, who shall, therein, have all the powers of the chancellor of the said State.

By section 3, of the act of March 3, 1863 (12 Stats., 763), all the jurisdiction of the Circuit Court of the District of Columbia was conferred upon, and vested in the Supreme Court of the District of Columbia.

It will be observed, therefore, that when the cases of *Van Ness* vs. *Van Ness*, and *Brown* vs. *Wylie*, were before this court, there was, subsisting within the District of Columbia, an independent judicial tribunal vested with all the powers and jurisdiction conferred upon the orphans' courts of the State of Maryland by the then existing laws of that State, and subject to all the restrictions and limitations imposed upon said courts by such law. Under the laws, and with the judicial system as then existing, the decisions in those cases were inevitable.

When the case at bar arose, an entirely different system and laws prevailed in said district. By the act of June 21, 1870 (16 Stats., 161), it is provided, as follows: "Sec. 4. *And be it further enacted:* That all the powers and jurisdictions by law, now held and exercised by the orphans' court of Washington County, in the District of Columbia, shall hereafter be held and exercised by the justice holding the special term of the said Supreme Court for that purpose, *subject always to the same provisions as are contained in the fifth section of the Act of Congress, entitled 'An act to reorganize the courts of the District of Columbia, and for other purposes.' Approved March* 3, 1863."

"SEC. 5. *And be it further enacted:* That the orphans' court of Washington County, District of Columbia, be, and the same is hereby abolished, and all laws and parts of laws relating to said orphans' court, *so far as the same are applicable to said Supreme Court* are hereby continued in force in respect to said Supreme Court, and *all other laws and parts of laws relating to said orphans' court are hereby repealed. Provided, however*, That nothing herein contained

shall be construed to abolish the office of Register of Wills for said County."

These sections of the act of June 21, 1870, were not incorporated in the Revised Statutes relating to the District of Columbia, approved June 22, 1874. It is provided, however, by section 89, chapter 1 of the said revision that "The judicial courts of the District remain as organized on the twenty-first day of February, eighteen hundred and seventy-one, until abolished or changed by act of Congress." This section has been held to retain in the Supreme Court of the District of Columbia, all the powers that that court possessed on the 21st of February, 1871. In Re Estate David McIntire, 5 Mackey, 301.

Therefore, when the case at bar arose, there were no longer two separate tribunals, but the entire jurisdiction with respect to the case in controversy was vested in the Supreme Court of the District of Columbia, by which court the judgment complained of was rendered, and to which court the writ of error herein is directed. In view of these facts the language of this court in *Metropolitan Railroad* vs. *Moore*, 121 U. S., p. 573, with respect to the relation of the special terms of that court to its final action, becomes apposite. That language is "The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The Supreme Court sitting at special term and the Supreme Court sitting in the general term, though the judges may differ, is the same tribunal."

It would seem, therefore, that the decision of this court in *Van Ness* vs. *Van Ness*, (2 How., 68 and

69), referred to on page 15 of defendants' brief, is wholly inapplicable to the present case. The language of the court is: "If the judgment of the circuit court was reversed and a *venire de novo* awarded it would not alter the decree in the orphans' court. That court was required by law to act upon the finding of the jury, and not upon the judgment of the circuit court. And the reversal of that judgment and a new finding would not authorize the orphans' court to recall the judgment it had given, and was bound to give upon the original verdict certified by the circuit court."

Of course a reversal of a judgment rendered by one court could have no effect whatsoever upon a judgment rendered by another court, and that seems to be all which the language in this case imports. But all judgments or decrees entered by the Supreme Court of the District of Columbia, either in general or special term are, by statute, declared to be judgments and decrees of the Supreme Court. (Section 753 Rev. Stats. U. S. Rel. to the District of Columbia). This case is one of which the Supreme Court of the District of Columbia had jurisdiction, under existing law, and was finally decided, through the combined instrumentalities, of two of its special terms and its general term. A reversal by this court, therefore, of the judgment of the general term affirming the judgment of the special term, and the awarding by this court of a *venire de novo* does extinguish the judgment rendered upon the verdict, and therefore is entirely without the reasoning above referred to in the case of *Van Ness* vs. *Van Ness*.

Nothing in the testamentary laws of Maryland or of the decisions of that State construing those laws

can be held to restrict or control the practice or procedure of that court with respect to its control over verdicts and judgments rendered at one of its special terms, or in any manner to operate inconsistently with the general provisions of law organizing that court, and regulating its procedure and practice. For it will be observed that by the act conferring the Orphans' Court jurisdiction upon that court it is provided that only "laws and parts of laws relating to the said Orphans' Court, *so far as the same are applicable to said Supreme Court*, are hereby continued in force in respect to said Supreme Court, and all *other laws and parts of laws relating to said Orphans' Court are hereby repealed.*" Nor can they affect the right of review by this court, for, as was said by this court in *Railroad* vs. *Moore*, *supra*, at page 572:

> "Instead of construing these new statutory provisions in the light of the jurisprudence of Maryland previously prevailing in the District in reference to this subject, we think that when Congress reorganized the judicial system of the District by abolishing the old courts and by establishing the present supreme court of the District with its general and special terms and adopted them from the legislation of New York in substantially the same language, these provisions are to be construed in the sense in which they were understood at the time in that system from which they were taken. In other words we think that Congress adopted for this purpose the law of New York as it was understood in New York. (*McDonald* vs. *Hovey*, 110 U. S., 619).
>
> "It follows, therefore, that the previous practice of the courts of Maryland and the decisions of the Supreme Court of the United States in

reference to writs of error to and appeals from the former circuit court of this District are not entitled to the weight which was given to them by the supreme court of the District of Columbia in *Stewart* vs. *Elliott*, *ubi supra*, and in their judgment in this case."

It seems clear, therefore, upon principle and authority that the motion to dismiss the writ of error herein should be overruled and the case decided upon its merits.

JOHN J. JOHNSON,
WM. STONE ABERT,
WM. G. JOHNSON,
*For Plaintiffs in Error.*

IN THE

# *Supreme Court of the United States.*

OCTOBER TERM, 1889.

HAMILTON ORMSBY *et al.*,
*Plaintiffs in Error,*

*vs.*

WILLIAM B. WEBB *et al.*,
*Defendants in Error.*

No. 179.

JOHN J. JOHNSON,
WM. G. JOHNSON,
WM. STONE ABERT,
*For Plaintiffs in Error.*

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HAMILTON ORMSBY *et al.*,
*Plaintiffs in Error,*

*vs.* } No. 179.

WILLIAM B. WEBB *et al.*,
*Defendants in Error.*

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## Statement of Case.

These proceedings were upon a caveat to the will of Levin M. Powell, which is set out in full in the record. (Rec., pp. 4–9.) Issues were framed in the court below at its special term for orphans' court business, and sent to be tried by a jury, (Rec., 4,) resulting in a verdict sustaining the will, (Rec., 56.) The caveators thereupon moved the court to set aside the verdict and grant a new trial (Rec., 58), which motion the court overruled, entered judgment for the caveatees, admitted the said will to record and granted letters testamentary to the executors therein named, (Rec., 59.)

The points which it is sought to have reviewed in

this court are the rulings of the justice presiding at the trial of the issues, and are set out in the several bills of exception appearing at length in the record. (Rec., 10, 11, 12, 53, 54, 55, 56.)

The will in controversy was executed October 27, 1884, (Rec., 9,) and the testator died January 15, 1885, (Rec., 2.)

The testator's wife, Jeannette Thruston Powell, was his first cousin (Rec., 33,) and died before him, in 1880, (Rec., 34). He left no children nor descendants of any children, his only next of kin being his first cousins, (Rec., 13.)

The caveators are his first cousins and the first cousins of his wife on the Thruston side of the house. (Rec. 13.)

The testator left a personal estate of $85,028.40; (Rec., 21,) of which amount $56,300 is disposed of in pecuniary legacies and the residuum (exclusive of certain specific legacies not material to be considered), is divided equally among nine residuary legatees.

It is contended that this will was the result of undue influence exerted over Admiral Powell by Harriet C. Stewart, the principal beneficiary under said will, and that the evidence given at the trial fairly establishes the following facts:

At the time of the execution of the will Admiral Powell was in the eighty second year of his age, (Rec., 2,) he was totally blind (Rec., 14), had been an invalid, confined to one floor, for two years, and to his bed between six months and a year, (Rec., 16.) He was in a very feeble condition, confused in memory, and would confound persons and events,

(Rec., 20.) His mind was sufficiently enfeebled to render him subject to the influence of anyone in his immediate friendship. (Rec., 15.) His death was due to no one disease, but to a gradual breaking down of all his functions, a failure of all his organs, the final symptoms being due to *uraemia*. (Rec., 15.)

During the lifetime of Mrs. Powell, and for a period of twelve years next preceding the death of the testator, the visitors at his house were the Thrustons of Cumberland, Mrs. Raeder, Mrs. Houck and Miss Manning, Mrs. Susan Brand and the Misses Weeks. Dr. Powell, of Alexandria, a legatee in the will, came occasionally, but never staid long. (Rec., 17.)

Mrs. Susan Brand, first cousin of both the Admiral and his wife, on the Thurston side (Rec., 13), had been on intimate terms with them for thirty years (Rec., 14). She was a frequent visitor, staying at the house often for two months at a time; was sent for to give assistance in cases of sickness; was there aiding and attending Mrs. Powell during her last sickness up to her death (Rec., 14, 16, 20); afterwards, at the request of the Admiral, she remained and took care of him, for about five months, until he left the city in 1881 (Rec., 14, 28). The only persons who rendered aid and kindly offices to the family during the lifetime of Mrs. Powell, besides the servants, were the Misses Weeks and Mrs. Brand; they were frequent visitors, and she and they used to read to the Admiral (Rec., 14), and were treated as members of the family (Rec., 16). The Admiral and his wife both spoke very kindly of Mrs. Brand, and expressed sympathy for her needy condition (Rec., 20.) Miss Mary Weeks used to visit almost daily and read

to the Admiral (Rec., 20), and previous to August, 1881, he would send for her nearly every day (Rec., 21.)

Since the Admiral arrived at manhood he and the Powell family had not been intimate ; they had been alienated (Rec., 29). Mrs. Stewart, the principal legatee under this will, is one of that family (Rec., 45). She is a second cousin (Rec., 48), and would take nothing in the event of intestacy under the laws of the District of Columbia.

> Act of Maryland, 1798, Chap. 101, Sub. Chap. 11, Sec. 11 ;
> *Duvall* vs. *Harwood*, 1 Harr. & Gill, 474, 476–7;
> *Charlotte Hall School* vs. *Greenwell*, 4 Gill & J., 406, 415.

She was not liked by the Admiral; she gave him much trouble, and he complained of it (Rec., 21). He indicated his dislike for her openly and his wife had difficulty in making him behave well to her (Rec., 21). He expressed his displeasure with her, and complained that if permitted, she would take possession of everything (Rec., 21). In 1881, he said if he could not get rid of her he would take his servant and go to Aiken, South Carolina, or to Wormley's Annex, on I street (Rec., 28). He had also made entries of a disagreeable nature with reference to her in his diaries, between the years 1875 and 1882 (Rec., 15). She was only an occasional visitor at the house during the lifetime of Mrs. Powell (Rec., 14, 16). The other Powells who visited there only began to visit after Mrs. Stewart took charge of the house, and within a year and a half of the Admiral's death (Rec., 17).

Archibald Atkinson, named as legatee in the will, was a very near friend of Mrs. Stewart's, and came there only at her invitation (Rec., 16, 20); had never been mentioned in connection with the Admiral during twelve years (Rec., 20).

Notwithstanding these unpleasant personal relations, Mrs. Stewart came to live with the Admiral in December, 1880, after the death of his wife (Rec., 46). She and the Admiral were the only occupants of the house besides the servants. She obtained his confidence, and was appointed his deputy at the Safe Deposit, and given access to his vault there (Rec., 13). She immediately changed the order of affairs in the household and adopted a more expensive management; the Admiral objected to it, complained of the extravagance, and continued to object for about a year, but finally yielded to her and permitted her to do as she pleased (Rec., 16), though he was an economical man (Rec., 35). She regulated the admission of visitors, and would exclude them on the ground that the Admiral was tired, or asleep, or that the doctor had ordered that he should not see visitors (Rec., 16). The doctor gave no such orders, and testifies that his condition was not such as to justify any such directions (Rec., 14). This was without the Admiral's direction and against his wishes, and he complained of it and stated that he thought he should be allowed to be master of his own house and to decide for himself whether he would receive visitors or not (Rec., 27). Mrs. Brand was prevented from visiting the Admiral by Mrs. Stewart, and prevented from doing such kindly offices for him as she had before been accus-

tomed to do (Rec., 14, 16, 28). She was not admitted to see him for two years prior to his death, though she called every two or three weeks (Rec., 14). The Misses Weeks were also excluded by her (Rec., 16, 20, 21), though one of them called twenty-one days in succession (Rec., 21), and she gave orders that no one was to be admitted but Mr. Webb (Rec., 17). She stated to the Admiral, when he inquired for Miss Fannie Weeks, that she (Miss Weeks) could not come, and misrepresented her to the Admiral with respect to a present she had made him (Rec., 21). She directed Mr. Dixon, the Admiral's private secretary, never to leave the room when the Misses Weeks were with the Admiral (Rec., 15). During this time her conduct to the Admiral was demonstrative; she used to caress and fondle him (Rec., 14, 16, 17); apply terms of endearment to him (Rec., 14, 17), and talk "baby talk" to him (Rec., 17,). She interfered with the nurse and prevented the proper care and treatment of the Admiral (Rec., 14, 15, 17), and kept the nurse away from him for three weeks at a time (Rec., 17,); interfered with his secretary, stopped him from reading to the Admiral and cast aspersions upon the Admiral's correspondents (Rec., 15). She also complained to the Admiral of his secretary, Mr. Dixon (Rec., 16). During the Admiral's illness she was addicted to the excessive use of liquor (Rec., 14, 15, 16, 17). and plied the Admiral with liquor, thereby injuring his health and causing him much suffering (Rec., 15).

In December of 1880, or January, 1881, the Admiral made a will (Rec. 35). In that will the Misses Weeks received $1,500 (Rec. 35). In August, 1882, he made a second will bequeathing $74,300 in pecuniary lega-

cies (Rec. 21 to 24), giving to Mrs. Stewart $10,000, and making her one of five residuary legatees (Rec. 22, 24), and to other members of the Powell family legacies aggregating $12,000 (Rec. 22, 23), and cutting down the legacy to the Misses Weeks to $1,000 (Rec. 23).

On October 27, 1884, the will in controversy was executed whereby he disposes of $56,300 in pecuniary legacies. (Rec. 4 to 9.) Of this he gives to Mrs. Stewart $10,000 (Rec. 6), and also makes her one of nine residuary legatees (Rec. 7), and bequeaths to other members of the Powell family legacies aggregating $10,000 (Rec. 5, 6, 7). By this will he also gives to Mrs. Stewart's friend, Archibald Atkinson, $1,000 (Rec. 6). The legacy to the Misses Weeks is omitted in this will.

Mrs. Stewart remained at home the day the will was executed (Rec. 16), and afterwards asked the Admiral if it was "all completed now and forever" (Rec. 16). She had interested herself to procure its preparation and urged the solicitor to complete it (Rec. 44, 45). Other evidence was introduced which will be noticed hereafter.

This case has been submitted to the court upon motions to dismiss the appeal or affirm the judgment of the court below, both of which motions were denied.

*Ormsby* vs. *Webb*, 122, U. S. 630.

The case now comes before this court for hearing on the merits.

## Assignment of Errors.

1. The court erred in not admitting the testimony, set out in first Exception (Rec., 10), tending to show the derivation of the Admiral's estate.

2. The court erred in not admitting the testimony set out in the second exception (Rec., 11) tending to show that Harriet C. Stewart had been officious in procuring the bequests to herself in the said will.

3. The court erred in not admitting the evidence set out in the third exception (Rec., 16), tending to show that Harriet C. Stewart had procured the omission, from the benefits of the Admiral's will, of certain relatives provided for in two former wills.

4. The court erred in refusing to instruct the jury as prayed in the fourth exception (Rec., 53).

5. The court erred in refusing to instruct the jury as prayed in the fifth exception (Rec., 53).

6. The court erred in refusing to instruct the jury as prayed in the sixth exception (Rec., 54).

7. The court erred in not instructing the jury as prayed in the seventh exception (Rec., 54).

8. The Court erred in refusing to instruct the jury as prayed, in the eighth exception, and in its qualification of the said instruction (Rec., 55).

9. The Court erred in instructing the jury as prayed in the tenth exception (Rec., 55).

10. The Court erred in entering judgment for caveatees and in admitting the said will to probate and record and granting letters testamentary upon said estate.

## Brief of Argument.

I.

The first error assigned relates to the exclusion by the court of the testimony of Colmesnil, tending to show that the testator had derived his estate in the main from the common ancestor of the testator and the caveators. (Rec., 10.) The main question in the case was whether the will was induced by undue influence, and in determining that question the jury are always permitted to consider the reasonableness of the will, the circumstances and situation of the testator, the character of his estate, and the relation of the parties to the estate and the testator. If the testator received his estate from one branch of his family and by his will diverted it to another from whom he had been alienated since his manhood, (Rec., 29), it was a proper circumstance for the jury to know and consider in determining the reasonableness of the will.

*Davis* vs. *Calvert*, 5 G.& J., 307.

It was error therefore to exclude it, and this error was intensified by the subsequent admission, against objection, of testimony by the caveators (evidence of Mr. Webb, Rec., 33-34,) tending to show that the estate was derived from other sources than that indicated in the caveator's offer.

II and III.

The second and third errors assigned are of the same nature and refer to the exclusion of testimony tending to show the declarations by Harriet C. Stewart, the principal legatee, about the time of the execution of the will, of her knowledge, at that time,

of the fact that the will was made and of its provisions. It is obvious that her declarations would be admissible against her, were the controversy wholly between her and the caveators. It is not contended that such declarations amount to admissions or that they conclude any party; but it is always competent to show that a legatee participated in the preparation of the will and her declarations showing knowledge by her at that time of the contents of the will (Rec., 11), and her declarations that she had had certain persons excluded (Rec. 11), and that the will was made to suit her (Rec., 11), certainly tended to show that fact and should have been allowed to go to the jury along with other facts and be considered by them.

*Davis* vs. *Calvert*, 5 Gill & J., 307;
*Milton* vs. *Hunter*, 13 Bush, 163, 167, 168;
*Jackson* vs. *Vail*, 7 Wend, 125, 128;
*Morris* vs. *Stokes*, 21 Ga., 552, 570, 571;
*Fairchild* vs. *Bascomb*, 35 Vt., 398, 418;
*Beall* vs. *Cunningham*, 1 B. Monroe, 399, 401.

IV.

The fourth error assigned is the refusal of the court to grant the caveators' instruction embraced in the fourth bill of exceptions.

That prayer is as follows:

> "In order to establish undue influence it is not necessary to prove the influence to have been exercised at the time of the execution of the will or with reference to that act; but if the jury believe from the evidence that the undue influence existed prior to and near the time of the execution of the will, they may infer that the will was executed under the continuance of such influence." (Rec., 53.)

The nature of undue influence is such that it can rarely, if ever, be proved as applying directly to the testamentary act and at that time. It is an act which is necessarily done secretly and the evidence of which is always carefully hidden. If the testator be once proved to be under the dominion of a person (and certainly of one who is made a large legatee) that dominion is presumed to continue and control him until it is shown by proper evidence to have been overthrown. That the instruction stated the correct rule of the law is established by numerous authorities.

1 Wh. & Tud. Ld. Cas., 1280 and cases cited;
*Mowry* vs. *Silber*, 2 Bradf. Sur., 149, 153;
*Taylor* vs. *Wilburn*, 20 Mo., 306, 309, 310;
*Newhouse* vs. *Goodwin*, 17 Barb., 236, 258;
*Davis* vs. *Calvert*, 5 G. & J., 269, 303, 311, 312;
*Boyse* vs. *Rossborough*, 6 H. L., 51;
*Roberts* vs. *Trawick*, 17 Ala., 578.

V

The fifth error assigned covers the refusal of the court to instruct the jury as prayed in the fifth exception (Rec., 53), which is as follows:

> "If the jury believe from the evidence that the paper writing purporting to be the last will and testament of Levin M. Powell is arbitrary and unjust and largely in favor of Harriet C. Stewart, and that said Stewart was the nurse for and held confidential relations with said Powell at the time of the alleged execution of the said paper and for a long time prior thereto, and that said Stewart, as such nurse and confidant, might have improperly and unlawfully influenced the testator's mind, then, slight evi-

dence of such unlawful influence is sufficient to invalidate said will, unless rebutted by other proof."

The purpose of this instruction was to advise the jury that, in considering evidence of undue influence, they were to consider the relation of the person charged with exerting it, to the testator, and to remind them that less proof of undue influence is required where it is already proved that such person occupies a peculiar relation of trust and confidence, which is itself an influence, and where that person is a large beneficiary.

There was abundant testimony tending to show the arbitrary and unjust nature of the will. It excludes those of his relatives with whom he was most intimate and friendly, and includes those towards whom he was hostile; it gives to Mrs. Stewart about twice as much as it gives to any other person; she held confidential relations with him, acting as his deputy at the Safe Deposit Vaults (Rec. 13); controling his household (Rec. 13, 46); wrote to his solicitor for him in reference to the preparation of this will (Rec. 44); and as appears by her own letter was in his confidence with respect to it (Rec. 45); and assumed to nurse him in his illness during the time the will was made (Rec. 46, 47); even to the exclusion of the nurse employed for that purpose (Rec. 14, 17). This relation to the testator having been established by proper evidence, the instruction prayed should have been granted that the jury might consider the other testimony with the proper force as applied to one in her situation.

1 Wh. and Tud., Ld. Cas 1274-5-6-7;

*Mowry* vs. *Silbers*, 2 Bradf. Sur., 133, 147, 149, 151 ;
*Van Pelt* vs. *Van Pelt*, 30 Barb., 138, 9, 40 ;
*Tyler* vs. *Gardiner*, 35 N. Y., 559 ;
*O'Neil* vs. *Murray*, 4 Bradf., Sur. 320 ;
*Boyd* vs. *Boyd*, 16 P. F. Smith, (Pa.) 283, 293;
*Harrel* vs. *Harrel*, 1 Duvall (K'y), 203 ;
*Sears* vs. *Shafer*, 6 N. Y., 268, 271 2-3 ;
*Newhouse* vs. *Goodwin*, 17 Barb., 236, 58, 59 ;
*Harvey* vs. *Sullens*, 46 Mo., 147, 152-3-4 ;
*Kinne* vs. *Johnson*, 60 Barb., 77, 78 ;
*Dale* vs. *Dale*, 38 N. J. Eq., 274, 276 ;
*McLaughlin* vs. *McDevitt*, 63 N. Y., 213, 219.

VI.

The sixth error assigned is the refusal of the court to grant the instruction set out in the sixth bill of exceptions, as follows (Rec. 54):

> "Evidence that the said legatee, Harriet C. Stewart improperly influenced the testator as to other important matters and things than the execution of said will is proper to be considered by the jury as tending to show that she could and did improperly influence him to make the bequests in her favor or to exclude others of his next of kin and heirs at law, from a participation in his estate."

This instruction is but a corollary from the proposition involved in the prayer of the fourth exception (Rec. 53). The inherent difficulty, if not impossibility, of proving, by direct testimony the exercise of undue influence over the testator as to the testamentary act itself, leaves no other field open to the investigation of a jury than the course of the person charged towards the testator in respect of other mat-

ters. Moreover, it is to be observed that the prayer does not seek to make such evidence conclusive, but merely states that it is "*proper to be considered* by the jury as *tending to show* that she could and did improperly influence him," etc.

There was testimony before the jury tending to show such improper influence in respect of other important matters. She controlled him in respect to the management of his house (Rec., 16), as to the course of his reading and correspondence (Rec., 15), as to his medicine (Rec., 14–17), and his medical treatment and nursing (Rec., 14–15–17), and even as to his spiritual affairs (Rec., 13). By refusing this instruction and the one in the fourth exception (Rec., 53), the court, in effect, told the jury that they were confined to the consideration of evidence directly bearing upon the procurement of the will at the time of its execution. This, it is submitted, was manifest error, and must necessarily have prejudiced the caveators in the presentation of their case to the jury. The principle involved in the instruction was a proper guide to the jury and should have been submitted to them.

1 Wh. & Tud., Ld., Cas., 1280;
*Boyse* vs. *Rossborough*, 6 H. L. 51;
*Lewis* vs. *Mason*, 109 Mass. 171, 174;
*Newhouse* vs. *Goodwin*, 17 Barb., 258.

## VII.

The seventh error assigned is the refusal of the court to instruct the jury as prayed in the seventh exception (Rec., 54), which is as follows:

> "If the jury believe from the evidence that the said Harriet C. Stewart is a beneficiary un-

der said will and that she was instrumental in procuring the preparation and execution of the same, and if they further believe from the evidence that at and before the execution of the said will the said Stewart prevented certain of the next of kind or heirs-at-law of said testator, who are injured by said will from having access to him; that shortly before that time she wilfully misrepresented any of such next of kin or heirs-at-law to the said testator, they may infer from such circumstances that Harriet C. Stewart did unduly influence said testator in the execution of said will."

The caveators offered testimony in support of all the elements of fact involved in this instruction; that she is a large beneficiary, in fact the largest, is apparent upon the face of the will. She was active in procuring the preparation of the will. She sent a letter to Mr. Webb, in the Admiral's name (Rec., 44), requesting him to call and settle the matter, and with it sent the following letter (Rec., 45), in her own behalf:

"My Dear Mr. Webb: The Admiral is worrying over this matter. Can't you come and *make all safe* at once? *He knows exactly what he wishes*, and you understand him so perfectly that you need not wait upon anyone else. He is again very sick and feeble and *you will aid me very much* by getting this matter off his mind as quickly as possible. The very worry of waiting, my good friend, is most trying to one so aged. He has not your many occupations to fill his mind and time, and therefore this matter preys upon him.

I beg that you will give it your immediate attention, as his trust and confidence in you is so unbounded he will not trust it to any one else, even as a secret, till you have done your part.

Very truly, yours, H. C. Stewart."

She was careful to remain at home and be on hand when the will was executed (Rec., 16), and immediately thereafter went into his room and asked if it was "all completed, now and forever." (Rec., 16). She excluded Mrs. Brand and the Misses Weeks from seeing him before and after the execution of the will (Rec., 14, 16, 20, 21), and directed that no one should be admitted to the house except Mr. Webb (Rec. 17); and she misrepresented Miss Weeks to him (Rec. 21). The instruction therefore was in entire harmony with the evidence before the jury and was designed to direct them how rightly to consider that evidence in connection with the other facts in the case if they deemed those facts proved to their satisfaction, and should have been granted.

*Tyler* vs. *Gardiner*, 35 N. Y., 592, 593;
*Delafield* vs. *Parish*, 25 N. Y., 91–95.
1 Wh. & Tu. Ld. Cas., 1289.

## VIII.

The eighth error assigned is the refusal to grant and the qualification by the court of the prayer embraced in the eighth bill of exceptions. The prayer is as follows:

> "If the jury believe from the evidence that Mrs. Harriet C. Stewart, for the purpose of influencing said Levin M. Powell in making his will raised prejudices in the mind of said Powell against those who would otherwise have been the natural objects of his bounty and by contrivance kept him from intercourse with such persons, to the end that those prejudices or impressions which she knew he had thus formed to the disadvantage of such persons (if the jury so believe) might be removed, then the jury are

> entitled to consider these facts in connection with other facts in the case in deciding the issue relative to undue influence." (Rec., 55.)

It will be observed that all the court was asked to do in connection with this proposition was to tell the jury that they were *entitled to consider* such facts, if they believed them proved, in deciding the issue of undue influence.

The refusal of the court to grant this manifestly proper instruction in the form asked, coupled with its subsequent qualification of it, by saying: "But such facts would not of themselves amount to such proof as the law requires of undue influence sufficient to invalidate the will," tended to mislead the jury as to the proper weight to be given to evidence of this nature. It tended to create the impression in the minds of the jurors that such evidence was of trivial consequence, whereas, on the contrary, if believed by the jury, it would have sufficed without more, to justify a verdict against the will.

*Tyler* vs. *Gardiner*, 35 N. Y., 559, 92, 93, 94;
*Delafield* vs. *Parish*, 25 N. Y., 94, 95.

IX.

The ninth error assigned is the granting by the court of the instruction asked by the caveatees, which is as follows (Rec., 56):

> "If the jury believe the evidence of Harriet C. Stewart upon the subject of undue influence given by her in this case, then the verdict must be in favor of the defendants and in support of the will."

The effect of this instruction was to give undue prominence to the testimony of a single witness,

thereby taking from the consideration of the jury all the other facts in the case. The propriety of such an instruction may well be doubted, even if the testimony referred to went to the whole case and met every other fact adduced in evidence; but it is not easy to conceive any defence of the instruction in the light of the existing facts.

The only evidence of that witness, upon that question, is to the effect that she never said anything to the Admiral in *relation to the disposition of his property;* never exercised or tried to exercise any influence over his mind *as to the disposition of his property*, and never spoke to him on the subject of his will. (Rec., 47). The natural inference for the jury to draw, under this state of facts in connection with the instruction given above, was that, unless they believed that she had actually spoken to the Admiral directly upon the subject of these wills, and made suggestions with reference to his disposition of his property, their verdict must be for the will.

Few persons seeking to influence a testator would have the temerity to speak to him directly upon that subject, yet, being in sole control of him, having him, as he was "absolutely dependent upon Mrs. Stewart for information as to what went on in and outside the house" (Dr. W. W. Johnston, Rec., 14), with him nearly all the time she was home (Rec., 17), and in a position to poison his mind against others, to keep his attention concentrated upon her and her relatives, to lead him to believe, by her course of regulating the admission of visitors, that all, save she and they had deserted him, in his last days of deep affliction, stricken down by disease, bereft of his wife, blind, bed-ridden, and helpless and surrounded by uncontrolled servants, plied with liquor

by an intemperate associate—his only other associate being his secretary Thomas F. Cogan, a witness to the will, employed through her influence (Rec., 12,) and in the midst of domestic discords which it took all the care of the physician to quell (Rec., 14), she was thereby enabled to induce a state of mind which would result in the testamentary dispositions desired, without ever having said a word to him upon the subject of a will. It is this very state of affairs and course of conduct which the courts have repeatedly condemned as constituting such evidence of undue influence as will alone suffice to defeat a will.

*Tyler* vs. *Gardiner*, 35 N. Y., 592-3-4 ;
*Delafield* vs. *Parish*, 25 N. Y., 94, 95 ;
*Newhouse* vs. *Goodwin*, 17 Barb., 258-9.

X.

The tenth error assigned is that the Court entered judgment for the cavetees, and admitted the said will to probate and record, and granted letters testamentary to the executors therein named.

Of course, if the issues sent for trial were not fairly and legally submitted to the jury by reason of the erroneous rulings hereinbefore fet forth, the Court should have set aside the verdict and granted a new trial, instead of giving final effect to the verdict as rendered.

It is respectfully submitted that the judgment of the court below should be reversed and a new trial awarded.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

HAMILTON ORMSBY *et al.*, *Plaintiffs in Error*,
*vs.*
WILLIAM B. WEBB AND CHARLES D. DRAKE,
No. 1154.

## Brief for Defendants in Error on Motion to Dismiss or Affirm.

ENOCH TOTTEN,
*For Defendants in Error.*

R. O. POLKINHORN, PRINTER.

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## Brief for Defendants in Error on Motion to Dismiss or Affirm.

Levin M. Powell, late an Admiral in the United States Navy, died in the city of Washington on the 15th day of January, 1885, leaving a will bearing date October 27, 1884, and duly executed to pass real estate in the District. The inventory of the personal estate showed over $85,000.00 in value. The real estate amounted to about $20,000.00.

The testator left neither widow nor children, and his next of kin were first cousins and the descendants of first cousins.

On the 5th day of February, 1885, Sarah C. Colmesnil, a first cousin of Admiral Powell, exhibited her petition in the Supreme Court of this District, averring in substance, that the testator was not of sound mind and disposing memory at the time the said will was made, that he was wholly incompetent to make a will, and that the will had been procured by fraud and undue influence.

The petitioner prayed that "appropriate issues" might be directed by the court "to be tried, as provided by law."

Within a few days afterwards, the other plaintiffs in error also filed *caveats*. (See Adl., record, pp. 1, 2 and 3.)

On the 13th of February, 1885, an order was made by the special term of the said court, directing that plenary proceedings be had, and that issues be tried by a jury in the circuit court, which order and issues are as follows, to wit: (See adl. Record, p. 7.)

## Issues of Fact to be Tried by a Jury.

"Upon consideration of the petition of Charles D. Drake and William B. Webb, propounding as the last will and testament of the said Levin M. Powell, a certain paper-writing bearing date on the 27th of October, 1884, and the petition and caveat of Sarah Courtney Colmesnil, denying the said paper-writing, is the said last will and testament of the said Levin M. Powell, it is this 13th day of February, 1885, ordered, adjudged, and decreed that the following issues be transmitted to be tried in the Circuit Court before a jury, viz:

*First.* Whether the said paper-writing, purporting to be the last will and testament of the said Levin M. Powell, bearing date on the 27th of October, 1884, was executed and attested in due form of law.

*Second.* Whether the contents of said paper-writing were read to or by the said Levin M. Powell at or before the alleged execution thereof by him.

*Third.* Whether the said Levin M. Powell, at the time of the alleged signing of said paper-writing, was of sound and disposing mind and capable of executing a valid deed or contract.

*Fourth.* Whether the said writing was executed by the said Levin M. Powell, under the influence of suggestions, importunities, and undue persuasions of the said Harriet C. Stewart, or any other person or persons, when his mind, from its disordered, diseased, and enfeebled state was unable to resist the same.

*Fifth.* Whether the execution of said paper-writing was procured by fraud, misrepresentation, or undue influence or persuasion of the said Harriet C. Stewart, or any other person or persons, acting of their own volition or under the direction of the said Stewart."

These issues were regularly tried before a jury (Cox, Justice, presiding), and resulted in a verdict sustaining the will. During the trial exceptions were taken and reserved to the rulings of the court, and a motion for a new trial was made based upon such exceptions, and was heard in the general term in the first instance. On the 30th of October, 1885, the cause was heard by the general term, on the exceptions, and the rulings of the trial court were affirmed, (addl. R. 6.) This verdict or findings of the jury were certified in the usual form, to the special term, from which the issues emanated.

After this certificate had been filed in the special term, to wit, on the 5th of November, 1885, a motion was presented to that court by the *caveators* to set aside the verdict of the jury on the issues, because, as they alleged, the court on the trial of the issues improperly excluded testimony, and committed errors in refusing, as well as in granting, instructions to the jury. (See addl. record, p. 9.)

This motion was based upon the bills of exceptions, settled by the trial judge for the hearing of the motion for a new trial in the first instance in the general term, and these exceptions are now a part of the record in this court. On the following day this motion was heard and overruled by the special term (addl. Record, 7). On the same day the attorney for the caveators wrote at the foot of the said order a memorandum, stating as follows:

> "The caveators *except* to the foregoing order overruling their motion * * * to set aside the verdict of the jury upon the said issues, &c." (p. 8.)

Proceeding immediately to give effect to the verdict of the jury, the special term ordered that the will be admitted to probate, and that letters testamentary be issued to the executors named in the will (p. 8); thereupon the

caveators entered an appeal to the general term from the last order. (p. 9.)

The general term, on the 18th of February, 1886, affirmed both of these orders, but, by a clerical oversight or misapprehension, the order was so entered as to affirm only the order of the special term overruling the motion of the caveators to set aside the verdict on the issues, thus leaving the appeal from the order admitting the will to probate, and directing that letters testamentary should issue, apparently undecided. But when this clerical error was brought to the attention of the court below an order was made directing that the entry be corrected. This was done on the first of November, 1886, several weeks after the cause was docketed here. (For authority for this action see *Negley* vs. *Phillips*, 117 U. S., and *Elmore* vs. *Grymes*, 1 Peters, 469.) The record of this subsequent proceeding is also sanctioned by a stipulation of counsel, and has been brought up, and is filed here with the record and as a part of it.

## Points and Authorities.

The defendants in error now submit the following propositions of law, to wit:

*First.* This court is without jurisdiction to review the orders and judgments complained of by the appellants.

*Second.* Even if there is a color of appellate jurisdiction, it is manifest that the writ of error was taken for delay only, and that the questions upon which jurisdiction depends are so frivolous as not to need further argument.

The act of Congress, approved June 21, 1870 (16 Stat. 160), relating to the Supreme Court of the District of Columbia, has an important bearing on the question of the appellate power of this court in relation to decrees of the special term in probate matters. The first section of that act provides—

"That the several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by the act approved March third, eighteen hundred and sixty three, entitled 'An act to reorganize the courts of the District of Columbia, and for other purposes,' which have been or may be held, shall be and are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings and acts of said general terms, special terms, circuit courts, district courts, and criminal courts heretofore or hereafter rendered, made, or had, shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of said Supreme Court: *Provided*, That nothing herein contained shall affect the right of appeal as provided by law."

The fourth section provides that—

"All the powers and jurisdiction by law now held and exercised by the Orphans' Court of Washington County, in the District of Columbia, shall hereafter be held and exercised by the justice holding the special term of the said Supreme Court for that purpose, subject always to the same provisions as are contained in the fifth section of the Act of Congress, entitled 'An act to reorganize the Courts in the District of Columbia and for other purposes,' approved March third eighteen hundred and sixty-three."

The fifth section provides—

"That the Orphans' Court of Washington County, District of Columbia, be, and the same is hereby, abolished; and all laws and parts of laws, relating to said Orphans' Court, so far as the same are applicable to said Supreme Court, are hereby continued in force, in respect to said Supreme Court; and all other laws, and parts of laws, relating to said Orphans' Court, are hereby repealed;"

These provisions seem to put the orders of the special term, relating to testamentary business on the same footing with the orders relating to the general chancery business.

The act of Assembly of Maryland, of 1798, (ch. 101 sub. ch. 15 § 18.) provides for an appeal from orders in probate matters to the "general court," and declares that the decisions of such appellate court shall be "final and conclusive," but it has been held that the general statutes governing appeals from the Supreme Court of the District of Columbia, supersede that provision. *Nicholls* vs. *Hodges*, (1 Peters 562.) It should seem, therefore, that this writ of error must be determined by the act of Congress, of ~~February 25, 1879~~ (23 Stat. p. ~~[illegible]~~, ~~Richardson's sup. to R. S.~~). Md. 8, 1885

The first question then is—Is either of the orders in question made by the special term a *final* judgment?

The Statutes of Maryland of force in this District, relating to "plenary proceedings," and important in the discussion of the questions involved here are as follows:

> "Whenever either of the parties having a contest in the orphans' court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation).
> * * * * * *
> "And on such plenary proceeding, all the depositions shall be taken in writing, and recorded; and in case either party shall require, the court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient, under all circumstances, for trying the same; and the said issue or issues shall be tried in the said court of law as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses; and the power of the court of law, and proceedings thereto relative shall be as hereinbefore directed respecting the trial of issues; and the Orphans' Court shall give judgment or decree upon the bill and answer, or upon bill, answer, deposition, or finding of the jury."
>
> 2 Kilty's Laws, Md., Chap. 101, Sub. Ch. 15, §§ 16 17;
> Thompson's Digest, Laws D. C., p. 306, §§ 7, 8;
> Dennis' Probate Laws, D. C., p. 105 106.

The provision of the statute above referred to by the words, *hereinbefore directed*, are as follows:

> "At the instance of either party, the court may direct an issue or issues to be tried, and the same shall be tried in any court of law proper for the trial, and most convenient under all circumstances; and the court of law shall have power to direct the jury, and grant a new trial, as if the issue or issues were in a suit therein instituted, and a certificate from such court, or any judge thereof, of the verdict or finding the jury, under the seal thereof, shall be admitted by the orphans' court to establish or destroy the claim or any part thereof."
>
> 2 Kilty's Laws, of Md., Chap. 101, Sub. Ch. 8, § 20;
> Dennis' Probate Laws, D. C., p. 67;
> Thompson's Digest, Laws D. C. p. 53, § 89.

It is well established by authority that by these provisions every question passed upon by the jury is conclusively settled as to the "whole world," and that the special term had no discretion, but was bound by the statute to admit the will to probate.

*Pegg* vs. *Warford*, 4 Md., 385;
*Price* vs. *Taylor*, 211 Md., 363;
*Van Ness* vs. *Van Ness*, 6 How., 62.

In *Price* vs. *Taylor*, the Court of Appeals of Maryland used the following language in reference to these provisions of law:

> "The evident purpose of these provisions, was to enable either of the parties to any contest, upon plenary proceedings, to control the action of the court, in reference to the matter in dispute, by the finding of a jury on issues so framed as to present the subject of the contest. The duty of the orphans' court to make up and transmit issues to a court of law, when required, is imperative, and it is also bound to accept the conclusions of the jury as final, and to make them

> effective by proper orders or decrees. Issues are made up, not for the purpose of aiding the court in the exercise of its judicial functions, but to enable the party demanding them to ascertain, through the medium of a jury, a state of case which the court is bound to adopt, and to which its subsequent action must conform. In view of the purpose contemplated by the provisions of the act authorizing this mode of proceeding, we may safely assume that the orphans' court had no official interest to be subserved by a trial of these issues, and that their subsequent disposition was a matter in regard to which it had neither right of consultation nor control."

The motion to set aside the verdict of the jury on the issues was wholly futile; the caveators might, with as much propriety, have asked that court to reverse the judgment of this court, or to repeal an act of congress. It will not be denied that where a motion to set aside a verdict rests in the sound discretion of a court, the order of that court, denying or allowing such a motion, is not appealable; such an order can not be a "final judgment" in any sense of that term. But the special term did not even have discretion in this matter.

In any event it cannot be successfully maintained that an order denying a motion to set aside a verdict is a final judgment or decree, and it is therefore submitted that this court cannot review the order denying the motion to set aside the verdict on the issues.

The remainder of the question presented here arises upon the order of the special term admitting the will to probate and record, and directing that letters testamentary be issued. The controversy between the parties here relates exclusively to the validity of the will; but every charge which has been made against its validity has been submitted to a jury, and has been definitely and irrevocably decided in favor of the validity of that instrument. The law gives

to every person who disputes the validity of a will in the court below, the right to plenary proceedings, which, being demanded, the court has no power to refuse; this law establishes a special mode of proceeding by which the charges made may be tried in a decisive and speedy manner. The verdict of the jury in such a proceeding cannot be set aside, except by the trial judge or the general term of that court. These plaintiffs in error chose this course, and the verdict has been found against them; they have exercised their right of appeal to the general term, and there the verdict has been sustained. This verdict having been duly certified to the special term, the latter court had no discretion left; it was bound by the statute to carry into effect the verdict of the jury, and to admit the will to probate. This was not a "final" judgment or decree; the *final* judgment was made by the jury: the order complained of was only an intermediate step in carrying out, to completion, that which had been established by the jury. This was no more a final judgment than would be an order approving an account of an executor. In fact the order was not necessary. The will needed no order to admit it to probate. One of the issues submitted to the jury was, whether or not the will "was executed and attested in due form of law;" another was whether or not the paper had been read over to the testator before he executed it, and both of these questions were answered in the affirmative. The witnesses to the will were called and testified, before the jury, to the proper execution of the instrument and to the mental capacity of the testator. (See Old Record, p. 10.) The will was fully authenticated by the verdict of the jury. There was therefore no further proof of the will necessary. As to the "record" of the will, it is sufficent to refer to the provisions of the act of 1798 (Ch. 101, Sub. Ch. 15, Sec. 9), which makes it the duty of the register of wills to "make a fair *record*, in a strong bound book or books, *of all wills* proved

before him, or the said court, or *authenticated according to this act.*" (Thompson's Digest, Laws D. C., 311, § 8.)

The order is of no more dignity and of no more conclusiveness than is an order of the special term confirming a report made by a master in obedience to a final decree directing a sale of mortgaged premises, or directing an account between partners. It was merely a step in the direction of carrying into effect that which had been previously, finally fixed and settled.

Nor can an order of a court, issuing letters testamentary on a will found to be valid by the verdict of a jury, be a *final* judgment or decree; the letters issue, as of course, by force of the statute, and is nothing more than the means by which the dispositions of the testator, are carried out according to the forms of law. It may be properly said that it amounts only to a designation of the amount of security to be given, and the extending, on the record the evidence of an appointment, previously made by the testator and confirmed by the verdict of the jury, of certain persons to execute the will. Such an order cannot be a *final* judgment; such letters may be revoked by the special term at any time, for cause. For instance, by the act of 1798, (Ch. 101, Sub. Ch. 4,) several classes of persons are mentioned to whom letters may not be issued. If any person should receive letters who belonged to one of these ineligible classes, the letters would be revoked at once by the court. Such an order is therefore not conclusive, and cannot be final.

But, assuming that either of these orders was such a final judgment or decree as this court could review, what is there for this court to do? This court could not set the verdicts aside because the judgment of the general term affirming the verdict has not been brought here for review; if it had been this court would be without jurisdiction to review it, for the reason that that judgment or decree of the general

term was not final. This has been settled by this court. (*Van Ness* vs. *Van Ness*, 6 How., 62; *Brown* vs. *Wylie*, 4 Wall., 165.) Any judgment, therefore, of this court in this case would be ineffectual. In *Van Ness* vs. *Van Ness*, it was declared that a writ of error can hardly be maintained where the judgment of the appellate court would be ineffectual and nugatory." Suppose that this order of the court below should be reversed, what order or direction would be given to that court for its guidance in further proceedings? The verdict could not be disturbed, nor could any question touching the validity of the will be again raised on any of the grounds before submitted to the jury. The reversal of that order would still leave standing an irrevocable verdict and a valid will.

It is therefore submitted, in the language of the rule, that even if this court has appellate jurisdiction "the question on which the jurisdiction depends is so frivolous as not to need further argument."

The cause should be dismissed for want of jurisdiction, or the judgement of the general term should be affirmed.

ENOCH TOTTEN,
*For Defendants in Error.*

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# *Supreme Court of the United States.*

OCTOBER TERM, 1889.

HAMILTON ORMSBY *et al.*,
*Pl'ffs in Error,*

*vs.*

WILLIAM B. WEBB and,
CHARLES D. DRAKE.

No. 179.

## Brief for Defendants in Error.

ENOCH TOTTEN,
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# *Supreme Court of the United States.*

OCTOBER TERM, 1889.

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HAMILTON ORMSBY *et al.*,
*Pl'ffs in Error*,

*vs.*

WILLIAM B. WEBB and,
CHARLES D. DRAKE.

No. 179.

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**Brief for Defendants in Error.**

This cause is brought here by writ of error; it should have been brought by appeal. It comes from the probate branch of the Supreme Court of the District of Columbia, and is a contest over the last will of Levin M. Powell, late of this District.

Levin M. Powell, an Admiral in the United States Navy, died in the city of Washington on the 15th day of January, 1885, leaving a will bearing date October 27, 1884, and duly executed to pass real estate in this District. The inventory of the personal estate showed over $85,000.00 in value. The real estate amounted to about $20,000.00.

The testator left neither widow nor children, and his next of kin were first cousins and the descendants of first cousins.

On the 5th day of February, 1885, Sarah C. Colmesnil, a first cousin of Admiral Powell, exhibited her petition in the Supreme Court of this District, (2) averring in substance, that the testator was not of sound mind and disposing memory at the time the said will was made; that he was wholly incompetent to make a will, and that the will had been procured by fraud and undue influence.

The petitioner prayed that "appropriate issues" might be directed by the court "to be tried, as provided by law." Within a few days afterwards the other plaintiffs in error also filed *caveats*.

On the 13th of February, 1885, a decree was made by the special term of the said court (4) transmitting five issues to be tried in the circuit court before a jury. These issues presented the questions of fact raised by the averments in the petition.

On the 13th of March, 1885,(10) an order was made by the circuit court that the petitioner Sarah C. Colmesnil and the other caveators on the trial of said issues should be plaintiffs, and that Charles D. Drake and William B. Webb should be defendants.

These issues were subsequently tried before a jury (Cox, Justice, presiding), and resulted in a verdict sustaining the will. During the trial exceptions were taken and reserved to the rulings of the court. A motion for a new trial was promptly made which was overruled by the justice who tried the cause. (57.) From this decision an appeal was taken to the general term. On the 30th of October, 1885, the cause was heard by the general term, on a bill of exceptions and the rulings of the trial court were affirmed. (57.) The verdict of the jury was after-

wards certified in the usual form to the special term, from which the issues emanated.

After this certificate had been filed in the special term, to wit: on the 5th of November, 1885, a motion was presented to that court by the caveators to set aside the verdict of the jury on the issues, because as they alleged, the court on the trial of the issues improperly excluded testimony, and committed errors in refusing, as well as in granting, instructions to the jury. (58.) This motion was based upon the bill of exceptions, settled by the trial judge for the hearing of the appeal in the general term; these exceptions are found in the record in this court. (10.) On the following day this motion was heard and overruled by the special term. (59.) On the same day counsel for the caveators wrote at the foot of the said order a memorandum, stating as follows:

> "The caveators *except* to the foregoing order overruling their motion * * * to set aside the verdict of the jury upon the said issues, &c." (p. 59.)

Proceeding immediately to give effect to the verdict of the jury, the special term ordered that the will be admitted to probate, and that letters testamentary be issued to the executors named in the will (p. 59); thereupon the caveators entered an appeal to the general term from the last order, and the general term on the 18th of February, 1886, approved and affirmed the action of the special term. Afterwards, and on the 8th day of March, 1886, the caveators sued out this writ of error, and on the 15th day of October, 1886, the transcript was filed and the cause was docketed in the clerk's office of this court.

## Points and Authorities.

I.

*This court is without jurisdiction to review this cause because it is a case of equity jurisdiction, and cannot be brought into the Supreme Court for review on a writ of error, and the motion to dismiss the writ of error should be granted.*

Section 691 of the Revised Statutes provides for bringing final judgments in *civil actions* to this court for review upon *writs of error*, and section 692 provides for bringing into this court for review final decrees in cases of equity jurisdiction *by appeal*. It it is well settled that a final decree in an equity cause cannot be brought into this court for review by means of a writ of error. *McCallum* vs. *Eager*, 2 How., 61; The San Pedro, 2 Wheat., 132; *Walker* vs. *Dreville*, 12 Wall., 442; *U. S.* vs. *Emholt*, 105 U. S. 414; *Hayes* vs. *Fischer*, 102 U. S. 121; *U. S.* vs. *Circuit Judges*, 3 Wall., 673; *Surgett* vs. *Lapice*, 8 How., 48; *Brewster* vs. *Wakefield*, 22 How., 118.

The proceedings in the special term of the court below, when in the exercise of probate jurisdiction, are conducted by means of the same forms and in the same manner and by the same justice as are those relating to the exercise of general chancery jurisdiction. The difference existing consists in the extent of the jurisdiction or power exercised, one being limited and the other general, and in the somewhat anomalous circumstance that the records relating to the orphan's court business are kept by the "Register of Wills" and not by the clerk of the court. The proceedings in that court having the essential

features of chancery proceedings, an appeal is the only method by which a cause of probate jurisdiction arising in the special term can be brought into this court for review. A brief reference to the statutory provision of force in this District, in relation to the jurisdiction and proceedings in the "Orphans' Court," or in the special term of the Supreme Court of the District when exercising probate jurisdiction, will show clearly that the case is one of plain equity jurisdiction.

Our testamentary laws and our orphans' court were of Maryland origin. Orphans' courts were organized in Maryland by statute—

> "For the purpose of taking the probate of wills, granting letters, testamentary and of administration, directing the conduct, settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relating to the affairs of deceased persons, according to law."

In and by the same act it was provided that—

> "The orphans court shall have full power, authority and jurisdiction to examine, hear and decree upon all accounts, claims and demands, existing between wards and their guardians, and between legatees, persons entitled to any distributable part of an intestate's estate, and executors and administrators, *and may enforce obedience to, and execution of their decrees, in the same ample manner as the court of chancery may.*"

Dennis Prob., Law 101, 104;

Thompson's Digest, 302, 303;
Kilty's Laws of Md., Ch. 101, Sub. Ch. 15, Sec. 1;
Kilty's Laws of Md., Ch. 101, Sub. Ch. 15, Sec. 12;
See also Testamentary Law of Md. (Hinkley), 215.

The powers and jurisdiction here granted are essentially those of an equity court; the statute expressly provides for compelling obedience to the "decrees" of the court in the same manner as a "court of chancery" may. This is a grant of clear equity power and jurisdiction and a classification of the final orders of the court as *decrees.*

It has long been settled that the administration of the assets of deceased persons, or, to use the language of the Maryland statute, "administering justice in all matters relating to the affairs of deceased persons," is one of the most important branches of equity jurisdiction. (1 Story's Eq. Juris., § 530.) The nature of the proceedings cannot be regarded as different because conducted in an Orphans' Court. As long ago as 1827, it was decided that a bill of review could be maintained to review a decree of the Orphans' Court of the District ot Columbia, and that such a bill was analogous to a bill of review in equity.

*Mauro* vs. *Ritchie*, 3 Cr. C. C., 147.

The court of appeals of Maryland has held that the orphans' courts of that State are not courts of common law jurisdiction, and that they are not within the provisions of the *Statute of Westminster*, and

therefore, in controversies before them, parties are not allowed bills of exceptions.

*Mayhew* vs. *Soper*, 10 G. & J., 366.

By the Act of Congress of February 27, 1801 (2 Stat., 107), the appointment of a judge of the orphans' court for the County of Washington was authorized, and it was provided that such judge should exercise all the powers and perform all the duties which are exercised and performed by the judges of orphans' courts in the State of Maryland. By the act of June 21, 1870 (16 Stat., 160), the orphans' court above provided for was abolished, and its powers and jurisdiction were required to be exercised "by the justice holding the special term" of the Supreme Court of the District of Columbia. The jurisdiction in probate matters is, therefore, now exercised in this District by the same justice and in the same court as is the general chancery jurisdiction.

The language used by this court in reference to a cause upon this subject, which came up from the State of Louisiana, is peculiarly applicable here. The case was brought up by writ of error instead of by an appeal. In dismissing the writ, the court said:

> "The pleading, the orders, the decree of the court show, we think, so as to need no further argument to a mind familiar with the principles of equity jurisprudence, that the procedure is, in its essential nature, a foreclosure of a mortgage in chancery. It has all the essential qualities of such a suit, and it has none which is not usual and appropriate in such a proceeding."
>
> *Walker* vs. *Dreville*, 12 Wall., 440.

The same may be said of the proceedings in the special term in this cause.

In the case of the *U. S.* vs. *Judges*, 3 Wall., 673, which arose under the act of March 3, 1851, providing for the settlement of private land claims, the proceedings were analogous to equity proceedings. "The claims were to be determined according to the law of nations, the stipulations of the treaty, the several acts of congress in relation thereto, the laws and ordinances of the government from which the titles were derived. The proceedings were regarded as in the nature of a proceeding in equity, though the analogy was not very close, the decision on the claim being in the form of a decree." It was held that an appeal was the proper method of bringing the case up to this court.

In the case of *Carter* vs. *Cutting* (8 Cranch 251), it was held (1814) that an "appeal" would lie from the sentence of the circuit court of this District affirming the sentence of the orphans court of Alexandria County, Virginia, which dismissed a petition praying that the probate of a will be revoked. That case is authority for the correctness of the practice of bringing such a case, as is this, to this court by *appeal*. It may safely be asserted that if an *appeal* was an effectual and proper means of bringing up that case to this court, a writ of error would have been ineffectual. There can be but one way to bring such a cause into this court, and if this can properly be done by appeal it must follow that it cannot be done by a writ of error.

On this branch of the case it will be observed that the writ of error seems to be addressed and confined

exclusively to that part of the case which was conducted in the circuit court on the trial of this issue. By a special order of that branch of the court, the interested parties were divided into plaintiffs and defendants, and the cause was given a number on the docket of the law side of that court (No. 26,031. See pp. 10, 57.) This was for convenience. There is neither statute nor rule requiring this to be done. The "Probate" number was 1771 (60), by which number the case was known in the probate branch of the court, the records of which are in the custody of the Register of Wills, as before stated. This writ of error is made to declare as follows: "Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said court * * * between Hamilton Ormsby * * * plaintiffs, and William B. Webb and Charles D. Drake, defendants, being No. 26,031 at law, a manifest error hath happened," &c., &c. This writ seems to be aimed at this particular portion of the case, and seems to seek a review of the alleged errors of law appearing in the record, which occurred in the trial court when the issues were tried. In fact, this is precisely what the parties wish to accomplish by this writ, notwithstanding the fact that it was decided in *Van Ness* vs. *Van Ness* that this could not be done.

II.

*The decree of the special term admitting the will to probate, and granting letters testamentary was made in accordance with the requirements of the statute and was rightly made.*

The plaintiffs in error contend that they appealed to the general term from the order of November 6, 1885, (59) overruling their motion to set aside the verdict of the jury on the issues, and grant a new trial. This is denied; an *exception* to an order is not an *appeal*.

The special term was wholly without authority to set aside the verdict. That power is specially conferred on the law court trying the issues by the statute, as we shall see. They did appeal to the general term from the decree admitting the will to probate, and granting letters testamentary thereon (60), and the sole question in the case is: Is this decree erroneous?

Reference to the statutes governing proceedings of this character will, we think, make it clear that there was no other course for the special term to pursue. It possessed no discretion. It was bound by the mandatory terms of the statute to admit the will to probate and issue the letters, or in other words, to do just what it did do. These statutory provisions are as follows:

> "Whenever either of the parties having a contest in the orphan's court shall require, the said court may direct a plenary proceeding by bill or petition;
>
> * * * * * *
>
> and in case either party shall require, the court shall direct an issue or issues to be made up and sent to *any court of law* which may be most convenient, under all circumstances, for trying the same; and the said issue or issues shall be tried in the said court of law as soon as may be, without any continuance longer

than is necessary to procure the attendance of a witness or witnesses; and the power of the court of law, and proceedings thereto relative shall be as *hereinbefore directed* respecting the trial of issues; and the Orphan's Court *shall give judgment or decree upon the bill and answer, or upon bill, answer, deposition, or finding of the jury.*"

2 Kilty's Laws, Md., Chap. 171, Sub. Ch. 15, §§ 16, 17;

Thompson's Digest, Laws D. C., p. 306, §§ 7, 8;

Dennis' Probate Laws, D. C., p. 105, 106.

The provision of the statute above referred to by the words "hereinbefore directed," are as follows:

"At the instance of either party, the court may direct an issue or issues to be tried, and the same shall be tried, in *any court of law* proper for the trial, and most convenient under all circumstances; and the court of law shall have power to direct the jury, and *grant a new trial, as if the issue or issues were in a suit therein instituted*, and a certificate from such court, or any Judge thereof of the verdict or finding of the jury, under the seal thereof, shall be admitted by the orphans' court *to establish or destroy the claim* or any part thereof."

2 Kilty's Laws, of Md., Chap. 101, Sub. Ch. 8, § 20;

Dennis' Probate Laws, D. C. p. 67;

Thompson's Digest Laws D. C., p. 53, § 89.

It is well established by authority that by these provisions every question passed upon by the jury is conclusively settled as to the "whole world," and that the special term had no discretion in this case,

but was bound by the statute to admit the will to probate.

*Pegg* vs. *Warford*, 4 Md., 385;
*Price* vs. *Taylor*, 21 Md., 363;
*Van Ness* vs. *Van Ness*, 6 How., 62.

In *Price* vs. *Taylor*, the Court of Appeals of Maryland used the following language in reference to these provisions of law:

> "The evident purpose of these provisions, was to enable either of the parties to any contest, upon plenary proceedings, to control the action of the court, in reference to the matter in dispute, by the finding of a jury on issues so framed as to present the subject of the contest. The duty of the orphans' court to make up and transmit issues to a court of law, when required, is imperative, and *it is also bound to accept the conclusions of the jury as final, and to make them effective by proper orders or decrees.* Issues are made up, not for the purpose of aiding the court in the exercise of its judicial functions, but to enable the party demanding them to ascertain, through the medium of a jury, a state of case which the court *is bound to adopt*, and to which its subsequent action must conform. In view of the purpose contemplated by the provisions of the act authorizing this mode of proceeding, we may safely assume that the orphans' court had no official interest to be subserved by a trial of these issues, and that their subsequent disposition was a matter in regard to which it had neither right of consultation nor control."

These provisions of the statute were fully considered by this court in *Van Ness* vs. *Van Ness*, above cited. The opinion of the court was delivered by the Chief Justice who was familiar with the practice

and proceedings under these testamentary laws in the Maryland courts. Speaking of the power and duty of the orphans' court in reference to the finding of the jury in a case like the present, the court said:

> "It is true the orphans' court has no power to grant a new trial and is bound to consider the fact to be as found by the jury; and consequently the judgment of that court must be against the plaintiff. But the matter in contest in the orphans' court is the right to the letters of administration. And it is the province of that court to apply the law upon that subject to the fact, as established by the verdict of the jury and to make their decree accordingly." (6 How., 67.)

The plaintiffs in error appealed to a jury by demanding issues; they had by law an absolute right to this jury trial, and they got it; the verdict was rendered against them; they then alleged errors and appealed to the general term, and the verdict was there sustained. The verdict was then sent to the special term according to law, and the decree, now complained of, necessarily followed because the statute required that it should follow. The special term, without looking beyond the finding of the jury, had no discretion; it was bound to enter this decree and it could enter no other. Any other decree would have been erroneous and an abuse. It may well be said that the decree is the decree of the statute and not of the court.

But the truth is that while this proceeding is in form a complaint against the decree of the special term, it is in reality an attack upon the verdict of the jury, and the rulings of the trial court and

general term. It is an invitation to this court to examine matters of fact and law in the exercise of its appellate power over the decree, which the special term was by law forbidden to consider in entering the decree, and to render judgment according to the extraneous matters.

In the case of *Van Ness* vs. *Van Ness*, 6 How. 62, the attempt was made to bring the cause into this court by means of a *writ of error* for review of the proceedings of the law court which tried the issues sent out by the orphans' court; in *Brown* vs. *Wylie*, 4 Wall, 165, the writ of error was sued out to bring up for review, the *order* of the general term affirming the proceedings of the law court which tried such issues. Both of these writs were dismissed, because the order, judgment or decision as to which error was alleged, was not *final*. To avoid this result the parties in this cause went back to the special term, holding court for probate business with the bill of exceptions attached to a motion to set aside the verdict, and on the strength of the alleged errors contained in and disclosed by this bill of exceptions. On this paper they sought to resist the making of the decree on the verdict as required by law, and to allege error in the special term and by this circuitous and indirect method they hope to secure in this court the review of the proceedings of the law court which tried the issues. In other words, they seek to secure a review, by this court, of the alleged errors in the rulings of the court which tried the issues by alleging error in the final decree of the special term. This cannot be done; the special term could not consider the bill of exceptions. If it is true, as was said by this court in *Van Ness* vs. *Van Ness*, that

the special term was bound by the verdict, then this court is also bound by it. If the special term could look only at the verdict, without considering the proceedings which led to it in the law court, then this court can do no more. In the exercise of appellate jurisdiction this court cannot look beyond the facts which were before the special term for its consideration, at the time the decree comp ained of was entered.

Even if it shall be conceded that the plaintiffs have been aggrieved and that they ought to have relief, it would be difficult to see how a remedy could be applied now, they having failed to convince the two courts having power over the verdict, of the justice of their complaints. What direction could this court give as to the further proceedings in the cause, in the event of a reversal of the action of the court below?

In the case of *Van Ness* vs. *Van Ness*, when discussing the consequences of reversing the judgment of the circuit court on the trial of such issues the chief justice said:

> "If the judgment of the circuit court was reversed, and a *venire de novo* awarded, it would not alter the decree in the orphans' court. *That court is required by law to act upon the finding of the jury*, and not upon the judgment of the circuit court. And the reversal of that judgment and a new finding would not authorize the orphans' court to recall the judgment it had given and was bound to give, upon the original verdict certified by the circuit court." (p. 68, 69.)

III.

*There is no error shown in the record of the trial in the law court.*

The exceptions numbered one, two and three (Record, pages 10, 11), are based on the exclusion of evidence offered by the caveators. The caveators attempted to show by a witness produced for the purpose, that the testator had at some time told such witness that he (the testator) had "*received the bulk of his estate* by breaking the will of his grandfather." This was excluded, and constitutes the ground of the first exception. We submit that this evidence was properly excluded. The caveators have no right to object to the title of the testator to the property devised and bequeathed ; it is enough that they object to the manner of its distribution. How can it be material here whether the testator obtained the property in one way or in another ? Neither the nature of the title of the devisor to the property in question, nor the method of acquiring such property by him, can enter into the controversy concerning the validity of his will, nor can they form any ground of exception in the case before the court. Objection must be made and sustained to the manner of the distribution made by him of such property to form any valid ground of complaint in this controversy. It cannot be material how or from whom the testator acquired his property, and the court below very properly excluded the testimony offered.

The second and third exceptions are based upon the supposed right of the caveators to give in evidence, in support of the charge of undue influence

alleged against Mrs. Stewart one of the principal legatees, declarations alleged to have been made by her after the execution of the will. Such declarations, if made by her, could not in any way be competent evidence, she not being a party to the cause. If such declarations could affect or invalidate a will, the power of disposition of property by will would be at the mercy of a loquacious or a dishonest legatee, no matter how small his legacy might be. Mrs. Stewart might have obtained this supposed information concerning the contents of the will in many entirely innocent ways, which will readily suggest themselves. Counsel who drew the will might have told her of the will and its legacies, or might have told others, who might have told her. There is no suggestion, and there was no offer to prove that Mrs. S. obtained this information improperly.

The matters relied on in the second exception, we submit, are wholly immaterial. What Mrs. Stewart said to these persons, after the date of the will, during the last sickness of the testator, touching her satisfaction or dissatisfaction with the provision of the will can have no weight. *Shailer* vs. *Bumstead*, 99 Mass., 127, is authority for this, and in addition to this, the counsel for the appellants fully cross-examined Mrs. Stewart on this very point. (50.) They might have recalled Miss Condon, and inquired of her as to this matter, but after the collision between that witness and Dr. Addison, they probably preferred not to recall her.

The same remarks are applicable to the matters referred to in the third exception. Mrs. Stewart was

also cross-examined fully as to this alleged conversation with Mr. Thruston, as were both the Weeks girls, and the caveators had the benefit of the evidence. (50.)

The fourth exception contains a statement of the testimony, and includes one prayer offered by the caveators which was rejected by the court. This prayer (53) was intended to tell the jury that if the undue influence existed prior to and near the time of the execution of the will, they, the jury, might infer from that fact, that the will was executed under the presumed continuance of such influence. This does not represent the law as established by the authorities. The law is well settled by a long series of decisions that the undue influence must have been exerted at the very time of the execution of the will. The influence which will avoid and annul a will must be a present constraint, sufficient to overcome the free agency of the testator at the time the will was made, and such influence must have operated upon the mind of the testator at the very moment of his signing the will.

*Layman* vs. *Conrey Ex'r.*, 60 Md., 286;
1 Redf. on Wills, 534, 524;
*Eckert* vs. *Flowry*, 143 Pa. St., 46.

The fifth and sixth exceptions are submitted without argument. Counsel will hardly insist upon these instructions here.

The prayer in the seventh exception is, in part at least, based upon an assumption of facts. There is absolutely no evidence in the record tending to show that Mrs. Stewart was in the slightest degree "in-

strumental in procuring the preparation and execution" of the will.

In regard to the second paragraph of the prayer set out in this exception, it may be said that there is no intimation that Mrs. Stewart improperly "prevented" any of the next of kin or heirs-at-law of the testator injured by the will "from having access to him." But even if she did exclude them, it may have been in obedience to the directions of the testator's physicians, and necessary for his welfare. If so, it would have been her plain duty to exclude visitors whether next of kin or otherwise.

The last paragraph of this prayer is also unsupported by evidence. There is not a word of proof tending to show that Mrs. Stewart ever misrepresented any one of the next of kin, or heirs-at-law, to the testator.

But even if the assumptions upon which the prayer proceeds were founded upon evidence, it would not be proper to instruct the jury that they might "infer from such circumstance that Mrs. Harriet C. Stewart did unduly influence said testator in the execution of his will." No court could permit a verdict, founded upon such inferences, to stand. All presumptions are in favor of the will, and they must be overcome by proofs.

The only objection which seems to be taken to the action of the court upon the prayer in the eighth exception (55) is to the modification made by the court. The court here authorized the jury to consider certain circumstances in their examination of the case, but told them that these facts standing alone would not be sufficient proof of undue influence to invali-

date the will. This, it is submitted, was a sound exposition of the law. But where is there in the record any evidence tending to show that Mrs. S. "*raised prejudices* in the mind of said Powell against those who *would otherwise have been the natural objects of his bounty*? Against whom did she raise such prejudices? Who were the *natural objects* of the testator's bounty? The nearest relations were first cousins; is a man's first cousin the natural object of his bounty? If so, are second and third cousins also? The Weeks girls were *third* cousins, and, it may properly be added, not favorite cousins.

The prayers set out in the ninth and tenth exceptions relate to the question of undue influence, and, it is submitted to the court that they properly apply the law to the case as it then stood.

It is in proof that the testator in this case made three wills, one in 1881 (35), another in 1882 (21), and the present will of October 27, 1884. By the first will he gave to Mrs. Stewart $10,000. By the second will and the second codicil he gave her $10,000 and one-third of the residuum. By the third and last will Mrs. Stewart gets $10,000, and one-ninth (9th) of the residuum, and the residuum is diminished by the dwelling house, worth $20,000, which was devised for the benefit of the college. The loss of Mrs. Stewart by the making of the last will, which is alleged to be the result of her undue influence over the mind of the testator, is $9,666.66. The jury was asked to believe, and we are asked to believe, that Mrs. Stewart exerted an undue and unlawful influence on the mind of her kinsman in order to lessen her bequests to the extent of $9,666.66!

The writ of error should be dismissed. If this cannot be done then the decree of the court below should be affirmed.

ENOCH TOTTEN,
WM. B. WEBB,
*For Defendants in Error.*